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FILED
SEP 27 2002
OFFICE OF THE CLERK

No. 02-____ 02-523

IN THE

Supreme Court of the United States

RUSSELL J. HENDERSON, DOREEN KEELER, ROBERT H. LOEWY, and GREATER NEW ORLEANS SECTION OF THE NATIONAL COUNCIL FOR JEWISH WOMEN,

Petitioners,

—v.—

RICHARD L. STALDER, SECRETARY, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, and JOHN KENNEDY, STATE TREASURER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals, in reviewing the district court's grant of a preliminary injunction, erred in exercising jurisdiction over a new legal claim and new parties added to the complaint after the Respondents filed their notice of appeal of the preliminary injunction, and in exercising jurisdiction over issues not necessary to review of the preliminary injunction?

2. Whether the court of appeals erred in holding that Petitioners lack standing to bring a challenge to a proposed new state-operated, viewpoint discriminatory forum for speech because the remedy they requested is that the state be barred from opening the forum?

3. Whether the court of appeals erred in holding that Petitioners lack standing to bring an Establishment Clause challenge to a scheme under which pervasively sectarian private organizations act in concert with state officials to design, distribute and oversee a new state license plate program that will result in expenditure of taxpayer funds and under which only fundamentalist Christian organizations are permitted to serve on a new governmental council?

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Petitioners Russell J. Henderson, Doreen Keeler, Robert H. Loewy, and the Greater New Orleans Section of the National Council of Jewish Women hereby respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 287 F.3d 374 (5th Cir. 2002), and is reproduced in the appendix to this petition at A-1 - A-28. The opinion of the district court is reported at 112 F. Supp. 2d 589 (E.D. La. 2000), and is reproduced in the appendix at A-29 - A-50.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on March 29, 2002. Petitioners filed a timely petition for rehearing en banc, which was denied on August 9, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. La. Rev. Stat. § 47:463.61, the statute at issue in this case, is reproduced in the appendix at A-56 - A-59.

II. U.S. Const. amendment I (in relevant part):

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .

III. U.S. Const. amendment XIV (in relevant part):

Nor shall any State deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

IV. The "Choose Life" License Plate Act

In an unprecedented instance of legislative viewpoint discrimination, the State of Louisiana has sought to establish a blatantly viewpoint discriminatory forum for expression of only one view on the controversial issue of abortion. Specifically, the statute at issue in this case, enacted in 1999 and codified as La. Rev. Stat. § 47:463.61 ["the Act"], is an attempt by the State of Louisiana to establish a viewpoint discriminatory forum on state license plates, to utilize the fee paid by private car owners for access to the forum to further establish a viewpoint discriminatory government grant-making program, and to establish a pervasively sectarian, fundamentalist Christian "Advisory Council" to work in conjunction with state officials to implement the statute.

If implemented, the Act requires the Louisiana Department of Public Safety and Corrections ["the department"] to establish a "special prestige license plate to be known as the 'CHOOSE LIFE' plate, provided there are a minimum of one hundred applicants for such plate." La. Rev. Stat. § 47:463.61(A) (A-56).[1] The license plate is not available for official state or municipal vehicles, but is restricted to "passenger cars, pickup trucks, vans, and recreational vehicles." *Id.* The design and color of the

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[1] No license plate bearing a slogan with a viewpoint differing from this anti-choice slogan is available in Louisiana. In particular, no "Pro-Choice" or similar license plate is available. Indeed, during this litigation, a bill to establish a "Pro-Choice" license plate was considered but rejected by the Louisiana Legislature. *See* A-60 - A-64 (La. House Bill 53 (2001)).

license plate are to be determined by the "Choose Life Advisory Council" ["the Council"] *id.*, itself created by the Act as a new arm of Louisiana state government. *See infra* at 5-6.

Applicants desirous of expressing the "Choose Life" opinion on their car license plates must pay an annual fee of $25.00, in addition to the standard motor vehicle license fee required under state law, and must also pay a $3.50 "handling fee to be retained by the department to offset a portion of administrative costs." § 463.61(C) (A-56). The $25.00 fee is to be deposited into the state treasury, § 463.61(D) (A-56), and this same amount is to be deposited into the "Choose Life Fund," a special fund within the state treasury. § 463.61(F)(1) (A-58). The monies deposited into this special fund "shall be invested by the state treasurer in the same manner as monies in the state general fund and interest earned on the investment of such monies shall be deposited into the fund." *Id.*

The Act specifies in detail how the Choose Life Fund is to be distributed from the state treasury to private organizations. Any organization seeking a grant from the fund must fulfill several criteria. First, it must "submit an affidavit affirming its qualifications, which shall include a pledge to spend the money in accordance with the provisions of [the Act], to the Council," and must qualify as a tax exempt organization under section 501(c)(3) of the Internal Revenue Code. § 463.61(F)(2) (A-58). The organization must further "demonstrate that it provides counseling and other services intended to meet the needs of expectant mothers considering adoption for their unborn child." *Id.* Funds distributed to organizations must be used only for certain purposes: "Organizations receiving monies under [the Act] shall use at least fifty percent of such funds to provide for the material needs of expectant mothers considering adoption for their unborn child, including clothing, housing, medical care, food, utilities, and transportation. Such monies

may also be used to meet the needs of infants awaiting placement with adoptive parents. The remaining funds may be used for counseling, training, and providing pregnancy testing, but shall not be used for administrative, legal, or capital expenditures." § 463.61(F)(3) (A-58). The Act also places a broad restriction on the organizations eligible to receive distributions from the Choose Life Fund:

> No monies deposited into the fund shall be distributed to any organization involved in, or associated with counseling for, or referrals to, abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising.

§ 463.61(F)(2) (A-58). The Council, rather than a state official such as the state treasurer, "design[s] and review[s] grant applications." §463.61(E)(1) (A-57).

In addition to its important role in designing, receiving and reviewing applications for grants from the Choose Life Fund and in designing the Choose Life license plate, the Council also makes recommendations to the state treasurer as to which organizations shall receive grants.[2] The state treasurer makes disbursements "based on the recommendations of the Council," and then works with the Council to "review the distribution and expenditure of funds [under the Act] at least once every three years to ensure funds are distributed and expended in accordance with" the restrictions on how the money is to be spent and on the involvement and association of grantees with abortion-related activities and advertising. § 463.61(G) (A-59). Moreover,

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[2] In addition, as set forth below, the Council's permanent members determine whether to appoint additional members and who those members will be. This power of appointment and control over its own composition is an important governmental power exercised by the Council alone, as is its design of the license plate and its design of applications for grants from the Choose Life Fund.

the state treasurer and the Council may "at [their] discretion" require a grantee organization to submit an annual audit prepared by a certified public accountant. *Id.*

Despite its significant role in the design of the license plate, the distribution of funds under the Act, and oversight over the grant program, the Council is neither elected nor appointed by state officials. Instead, the Act itself names the Council's three permanent members: (1) the president of the American Family Association, or his designee; (2) the president of the Louisiana Family Forum, or his designee; and (3) the president of the Concerned Women for America, or his designee. § 463.61(E)(1)(a)-(c) (A-57). These three members may "at [their] discretion" extend membership in the Council to certain categories of other individuals. § 463.61(E)(2) (A-57).

V. The Course of the Litigation

Once it became clear that a sufficient number of individuals (at least 100) had sought "Choose Life" license plates, so that the Act would be triggered, Petitioners filed a complaint in the United States District Court for the Eastern District of Louisiana challenging the Act under the First and Fourteenth Amendments, claiming that it violates their rights to freedom of speech and to be free of an established religion.[3] Plaintiff Keeler is a car owner who cannot express her opposing, pro-choice viewpoint on her license plate because the Act permits only the expression of the slogan "Choose Life," a well-known slogan of the anti-choice movement. Plaintiffs Russell J. Henderson and Rabbi Robert H. Loewy are Louisiana state taxpayers who object to their taxes being expended on the Act's program of license plates and grantmaking because so many governmental functions under the Act are either performed jointly by state officials

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[3] Thus, the district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331.

and fundamentalist Christian organizations or are performed by those organizations acting alone. Plaintiff Greater New Orleans Section of the National Council of Jewish Women ["NCJW"] is harmed by the inclusion of only Christian organizations on the Council established by the Act. Evidently non-Christian organizations are ineligible for the Council because they do not meet the criterion met by each of the organizations assigned to the Council by the Act based on their common feature of strict adherence to Christian doctrine.[4]

On August 29, 2000, the district court issued a preliminary injunction against enforcement or implementation of the Act. *See* 112 F. Supp. 2d at 602 (A-50). The district court found that plaintiffs were likely to succeed on the merits of their claim that the Act violates Plaintiff Keeler's free speech rights because it establishes a viewpoint discriminatory forum on car license plates. *Id.* at 601 (A-48 - A-49).[5] On September 26, 2000, the Respondents filed their notice of appeal. On November 16,

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[4] Plaintiffs' allegation that the three organizations placed on the Council by the Act are pervasively sectarian has been borne out by discovery conducted during the pendency of the state's appeal to the Fifth Circuit. For example, American Family Association is a self-proclaimed Christian organization, is run by an ordained minister, requires employees to act in accordance with the Bible, and inculcates its beliefs by instructing people how to pray and encouraging people to accept Jesus Christ as their savior. *See* Stipulation of American Family Association, Inc. ¶¶ 1, 5, 7-9. Similarly, Concerned Women for America also requires its employees to abide by religious principles, and proselytizes Christian beliefs through its radio show that is broadcast throughout the United States. *See* Deposition of Lee LaHaye 9:29-21;11:3-8; 83:10-16; *id.* 40:1-21; 43:3-17; 44:17-19; 45:6-11. Moreover, Louisiana Family Forum's Executive Director is an ordained minister and it proselytizes its Christian faith by instructing people on how to pray and what to pray for. Deposition of Gene Mills 7:12-14; Ex. 13 to Deposition of Darrell White.

[5] The district court concluded that plaintiffs had not yet demonstrated a likelihood of success on the merits of their claim that the Act violates the Establishment Clause. *Id.* at 593-95 (A-32 - A-36).

2000, after the notice of appeal was filed, plaintiffs amended their complaint to add Planned Parenthood of Louisiana and Rev. Eugene LaMothe as plaintiffs and to assert an additional cause of action under the First and Fourteenth Amendments, *viz.*, that the Act's grantmaking provisions discriminated against Planned Parenthood based on its pro-choice views and activities.

On March 29, 2002, the United States Court of Appeals for the Fifth Circuit reversed the District Court's preliminary injunction and remanded with instructions to dismiss the lawsuit, all on the basis that plaintiffs lacked standing.[6] First, not confining itself to the claims alive in the case at the time the notice of appeal was filed, the Fifth Circuit exceeded its jurisdiction under 28 U.S.C. § 1291(a)(1), by reaching and dismissing a claim and the party bringing that claim (namely Planned Parenthood and its claim that the Act's condition on grantees is unconstitutional) that were not before the court because they were added after the notice of appeal was filed.[7] On this claim, never considered by the district court and not properly before the court of appeals, the court ruled that Planned Parenthood's injury -- like Plaintiff Keeler's -- was not redressable because if the statute were enjoined, Planned Parenthood would be unable to obtain grants under the Act. *See* 287 F.3d at 382 (A-10) ("if the Choose Life statute is

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[6] Plaintiffs' standing *vel non* was not briefed by the parties in the court below before it issued its opinion; it had never been questioned by the State.

[7] The Fifth Circuit opinion appears itself to be of two minds as to which plaintiffs were before it. On the one hand, Planned Parenthood and Rev. LaMothe are not listed in the opinion's case caption in the court of appeals, and are not described as being among the "Plaintiffs-Appellees." *See* 287 F.3d at 374 (caption) (A-1), and at 376 (A-2) (listing Plaintiffs-Appellees). On the other hand, the court below nevertheless swept these later-added plaintiffs into its mandate of dismissal, simply asserting that "Although not named parties to the appeal, we have considered whether these later added plaintiffs have standing to challenge the constitutionality of the Choose Life statute." *Id.* at 376 n.2 (A-2).

declared unconstitutional, the injury complained of by [Planned Parenthood] would not be redressed because there would then be no fund from which [it] could seek grants."). Here, the court of appeals failed to consider the district court's duty, when faced with an unconstitutional statute, to fashion an appropriate remedy. For example, had the court of appeals not usurped the district court's role in considering this new claim, the district court might have found that the Act's condition on grantees to which Planned Parenthood objected was severable from the remainder of the Act. Moreover, as it did in finding that Plaintiff Keeler lacked standing (see discussion *infra*), the court held that stopping the state from implementing a viewpoint discriminatory statute does not redress any portion of the injury of the party subjected to the viewpoint discrimination. 287 F.3d at 382.

Second, the court below rejected the standing of Plaintiff Keeler on the basis that the relief she requested -- a declaration that the Act is unconstitutional and an injunction against its implementation -- would not redress her injury, because that remedy would not provide her with a forum (on a prestige license plate) to express her pro-choice view. The court of appeals evidently believed that elimination of the future viewpoint discrimination by directing the State not to open the forum at all did not redress any portion of Plaintiff Keeler's injury.

Third, the court below held that none of the state taxpayer plaintiffs had standing to challenge the Act on Establishment Clause grounds because tax dollars were not used to administer and implement the Act, even though the Act on its face states that fees charged to Choose Life license plate applicants only offset only "a portion of the administrative costs" associated with the Act's implementation. La. Rev. Stat. § 47:463.61(A-56 - A-59). The Fifth Circuit failed completely to consider NCJW's standing as an organization apparently excluded from membership on the Council based on its religious tenets.

Petitioners timely sought *en banc* review of the Fifth Circuit panel's decision. That request was denied on August 9, 2002. On September 24, 2002, the court of appeals denied Petitioners' motion for a stay of its mandate pending certiorari.

REASONS FOR GRANTING THE WRIT

The judgment of the court below should be reviewed by this Court both because of its dangerous enlargement of the interlocutory jurisdiction of the courts of appeals, and because of its drastic reformulation of the redressability component of standing and of the special rules governing standing to bring claims under the Establishment Clause.

First, in asserting jurisdiction over parties (Planned Parenthood and Reverend LaMothe) and a claim added to the case after the interlocutory appeal was filed, the opinion below not only conflicts with the opinions of every other court of appeals to have reached the issue, but also departs so far from the ordinary course of proceedings that it should be corrected by this Court. *See* Sup Ct. R. 10(a). Similarly, both in dismissing new parties and new claims, and in ordering the dismissal of Petitioners' standing under the Establishment Clause, the court below reached issues entirely unnecessary to reviewing the district court's grant of a preliminary injunction. The district court clearly did *not* base its injunction on the Establishment Clause or on claims brought by parties not yet before it at the time it issued the injunction. Thus, because it reaches these parties and claims, the judgment below conflicts with the opinions of several other courts of appeals that have held that a court of appeals hearing an appeal from the grant or denial of a preliminary injunction has jurisdiction only over issues necessarily involved with resolution of the propriety of the injunction.

Second, the court below reshaped the redressability prong of this Court's standing doctrine in a manner that conflicts

with the opinions of this Court. *See* Sup Ct. R. 10(c). This reshaping would undermine both First Amendment viewpoint discrimination doctrine and the protection afforded United States citizens under the Equal Protection Clause. When a plaintiff such as Petitioner Keeler challenges a planned new forum for speech that discriminates against her based on her viewpoint, blocking the establishment of the forum redresses at least *part* of her injury by eliminating the discrimination, even if, ultimately, no one, including her, may speak in that forum. For part of the injury involved in viewpoint discrimination, like that in most equal protection violations, is the injury of preferential treatment accorded state-favored viewpoints (or classes of citizens), and that part of the injury is redressed if equal treatment is maintained for all viewpoints by preventing the opening of the discriminatory forum in the first place. Similarly, even assuming that the court of appeals had jurisdiction over Planned Parenthood and its claim that the Act's grantmaking program discriminates against it based on its viewpoint, the injury to Planned Parenthood is redressed at least *in part* if the grantmaking program is never instituted, for then no organization will receive preferential treatment by the State. Simply put, the cramped view of redressability adopted by the court below is in direct conflict with the more expansive understanding of redressability established by this Court. Moreover, with respect to Planned Parenthood's standing, the court below further compounded its conflict with well-established law by closing its eyes to the possibility that the provision of the Act to which Planned Parenthood objected could be severed from the Act, a result that would have given Planned Parenthood full redress.

Third, the judgment of the court of appeals conflicts with the decisions of this Court and many other courts of appeals by rejecting the standing of Petitioners Henderson and Loewy to challenge the Act under the Establishment Clause even though the state taxes they pay will be used to

administer a statute involving the exercise of governmental power by religious entities both solely and jointly with state officials. *See* Sup. Ct. R. 10(a),(c). The court below compounded its error by analyzing the standing of one Petitioner, NCJW, as if that Petitioner was basing its standing on its status as a taxpayer, rather than as an organization harmed because it was excluded from the Act's Council based on its religion.

VI. The Court Below Lacked Jurisdiction Over Planned Parenthood's Newly Added Claim and Over Petitioners' Establishment Clause Claim.

It is well-settled that the jurisdiction of the courts of appeals under 28 U.S.C. § 1292(a)(1) is narrowly circumscribed. Thus, the *sua sponte* expansion of that jurisdiction by the court below conflicts with numerous decisions of other United States courts of appeals on the important issue of the scope of federal interlocutory appellate jurisdiction. Without appropriate limits on the scope of interlocutory appellate jurisdiction, the line between non-appealable interlocutory matters and the narrowly prescribed list of appealable interlocutory matters will become hopelessly blurred. The result could well be "a usurpation of the district court's role." *See Kershner v. Mazurkiewicz*, 670 F.2d 440, 449 (3d Cir. 1982) (*en banc*). The proper role of the courts of appeals vis-a-vis the district courts is certainly an important matter worthy of this Court's consideration.

Cases from several courts of appeals conflict with the opinion below on the proper scope of appellate review of preliminary injunction decisions by district courts. For example, in *Kaimowitz v. Orlando, Fla.*, 122 F.3d 41 (11th Cir. 1997), the Eleventh Circuit wrote: "the scope of the court's jurisdiction [under section 1292(a)(1)] is limited to matters directly related to the denial of injunctive relief." *Id.* at 43 (footnote omitted). Similarly, in *Fogie v. THORN Americans, Inc.*, 95 F.3d 645 (8th Cir. 1996), the Eighth

Circuit wrote: "In other words, in addition to the injunction order, we may [in a section 1292(a)(1) appeal] review other issues *only if they are inextricably bound up with the injunction*." *Id.* at 648 (emphasis added). Simply put, once the court of appeals decided (albeit erroneously) that Petitioner Keeler lacked standing, it decided all it needed to decide in order to reverse the district court's preliminary injunction.[8] It nevertheless also considered, and ordered the dismissal of, Petitioners' claims under the Establishment Clause (which had been found insufficient by the district court), and also considered, and ordered the dismissal of, the claim by Planned Parenthood that had *never* been considered by the district court. It is a matter of common sense that neither of these rulings was in any way necessary to reviewing the district court's grant of the preliminary injunction. Thus, the opinion of the court below, insofar as it reached Petitioners' Establishment Clause claim and Planned Parenthood's claim, conflicts with the venerable principle described by the Third Circuit in *Kershner*: "If . . . the appellate court can dispose of the section 1292(a)(1) appeal without venturing into otherwise nonreviewable matters, its jurisdiction should be limited accordingly." 670 F.2d at 449 (footnote omitted).

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[8] The court of appeals *did* have jurisdiction under Section 1292(a)(1) to reach the merits of Plaintiff Keeler's claim, which formed the basis for the district court's preliminary injunction, because Ms. Keeler's claim is one that does not require further factual development. Under this Court's holding in *Thornburgh v. ACOG*, 476 U.S. 747 (1986), a court of appeals has jurisdiction to review the merits of a claim brought before it via Section 1292(a)(1) if the "district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance . . ." *Id.* at 757. But this standard for reaching the merits is not met as to Petitioners' Establishment Clause claim (both because the district court did not rest its preliminary injunction on that claim and because the claim requires further factual development, *see infra* at 25-30), nor is it met as to Planned Parenthood's claim (because the district court had never even considered that claim).

In addition to exceeding its jurisdiction by reaching claims not necessary to review the district court's injunction, the court below also enlarged its jurisdiction in a second, even more alarming way. The court of appeals ordered dismissal of Planned Parenthood's claim ["the grant discrimination claim"], a claim added to the complaint after the notice of interlocutory appeal was filed, and therefore not possibly involved in any way in the district court's decision. Such a bold expansion of interlocutory jurisdiction is so extreme that Petitioners believe the opinion of the court below to be the only instance of a court doing so. In no category of interlocutory appeal has any other court of appeals exercised jurisdiction over a claim first filed in the district court after the notice of interlocutory appeal was filed.

Unsurprisingly, then, the holdings of several courts of appeals (of the Seventh, Ninth and Tenth Circuits) stand in direct conflict with the opinion below. In *Dempsey v. Guaranty Trust Co. of New York*, 131 F.2d 103 (7th Cir. 1942), *cert. denied*, 318 U.S. 769 (1943), the appellant had filed an interlocutory appeal from denial of a preliminary injunction under the predecessor to Section 1292(a)(1). After the appeal was filed, the appellant filed "his amended and supplemental complaint" in the district court. *Id.* at 104. The appellant asked the Seventh Circuit to consider his amended complaint. The Seventh Circuit rejected this request, holding that to accede to it "would not constitute orderly procedure," and that Section 1292(a)(1)'s predecessor "does not contemplate determination of the merits of an abandoned bill of complaint or an amended complaint subsequently filed in lieu thereof." *Id.* at 105. The court also observed: "[I]t would be very unfair for this court to consider the [denial of a preliminary injunction] complained of in the light of a pleading which was not before the District Court when it entered its order." *Id.* at 104. Accordingly, the Seventh Circuit dismissed the appeals.

In *Derish v. San Mateo-Burlingame Bd. of Realtors*, 724 F.2d 1347 (9th Cir. 1983), the court of appeals considered a certified interlocutory appeal under 28 U.S.C. § 1292(b). After the certification was accepted by the Ninth Circuit, the plaintiffs-respondents filed "a third amended complaint in the district court . . . " *Id.* at 1348. Relying upon the Seventh Circuit's holding in *Dempsey*, the court held that this third amended complaint was not properly before it.

The Tenth Circuit, in *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998), considered, under the collateral order doctrine, an interlocutory appeal by Kansas officials in which they contended that the district court had improperly denied their motion to dismiss on grounds of Eleventh Amendment immunity. After the district court ruled on the motion to dismiss, the plaintiffs filed an amended complaint. The Tenth Circuit refused to consider the additional claims contained in the amended complaint because they "were not before the district court when it considered the state defendants' motion to dismiss . . ." *Id.* at 1185 n.4.

These opinions of the Seventh, Ninth, and Tenth Circuits all conflict directly with the opinion of the court below; the former refuse to consider matters added to the case after the interlocutory appeal was filed, while the latter *sua sponte* reaches such matters.[9] Moreover, by reaching a claim not properly before it, the court below "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

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[9] The State never even requested that the court below consider the viability of the new grant discrimination claim.

VII. The Court Below Altered the Redressability Prong of Standing Doctrine In A Way That Conflicts With This Court's Decisions and the Decisions of Other Courts of Appeals.

The court of appeals held that Petitioner Keeler lacked standing to challenge the Act because, if she succeeded in her challenge, the Act would be declared unconstitutional and she would then still be unable to express her pro-choice viewpoint via a special prestige license plate; thus, the court below reasoned, her injury was not redressable and she lacked standing. 287 F.3d at 381 (A-9- A-10).[10] This "all or nothing" approach to redressability conflicts both with decisions of this Court and with decisions of several other United States courts of appeals, because the law confers standing on a party even when her injury is redressable only in part. *See, e.g., Made in the USA Foundation v. United States*, 242 F.3d 1300, 1311 (11th Cir.) (redressability prong satisfied where "at least some of the institutional plaintiffs' alleged injuries will be redressed.") (quoting district court), *cert denied*, 122 S. Ct. 613 (2001); *Rockefeller v. Powers*, 74 F.3d 1367, 1376 (2d Cir. 1996) (redressability requirement is satisfied even if the plaintiffs do "not perhaps [receive] the redress [they] would prefer."). As a specific instance of this general rule, both this Court and other courts of appeals have appropriately recognized that a statute, like the Act, that effectuates impermissible discrimination because it is underinclusive can be redressed either by expanding the

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[10] Oddly, the concurring opinion of Judge Jones suggests that Plaintiff Keeler's injury *would* be redressed if the State were ordered to "shut[] down the alleged First Amendment forum by banning, or ceasing to sponsor, all specialty plates." 287 F.3d at 386 (A-18) (Jones, J., concurring). It is difficult to understand how Judge Jones could, on the one hand, opine that invalidating the Act would not redress Keeler's injury because doing so "will do nothing to help *Keeler* speak within that alleged forum," *id.*, yet simultaneously propose that a more sweeping invalidation of the *entire* state special prestige license plate program would redress her injury.

statute to make it more inclusive or by eliminating the benefit conferred by the statute.

In the case of viewpoint discrimination such as that planned under the Act, it is axiomatic that exclusion from a proposed forum based on viewpoint involves *two* injuries: the injury of being discriminated against based on viewpoint, and the inability to speak at all in that forum.[11] Corresponding to these dual injuries are two remedies: elimination of the viewpoint discrimination by enlarging the forum to include the previously barred viewpoint, or preventing the viewpoint discriminatory forum from being established at all. While the latter remedy does not give the plaintiff *all* the relief she might desire, it nevertheless remedies *part* of her injury.

The court below held that preventing the establishment of the viewpoint discriminatory forum challenged by Plaintiff Keeler -- i.e., remedying the Act's underinclusiveness by eliminating the Act completely -- would not redress her injury. In fact, it would redress at least part of her injury, namely the injury she suffers by the creation of a new viewpoint discriminatory forum.[12] But many decisions of

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[11] The dissenting judge below defined the injury as follows: "[T]he plaintiffs here are injured by the government's promotion of one side of the debate on the abortion issue, coupled with the lack of opportunity to present their opposing view." 287 F.3d at 387 (A-20) (Davis, J., dissenting).

[12] The concurring opinion of Judge Jones below suggests that it would be unprecedented to remedy Plaintiff Keeler's injury by nullifying the Act and thereby censoring speech by those who wish to purchase "Choose Life" license plates. 287 F.3d at 387 (A-17) (Jones, J., concurring). But this suggestion is wide of the mark. As a consequence of the district court's preliminary injunction, *no Louisiana car owner has yet acquired a "Choose Life" license plate.* Thus, nullification of the Act would leave such potential speakers exactly where they would stand had the Act never been passed by the Legislature. There is no "censorship" at work in the district court's preliminary injunction, only maintenance of the *status quo*, under which no individual can acquire a special prestige plate that

this Court and other courts of appeals hold that elimination of discrimination in access to a government benefit -- even though the plaintiff may never receive the benefit because the benefit itself is eliminated for all -- redresses the discrimination. The decision of the court of appeals conflicts with these decisions by requiring Petitioner Keeler to demonstrate that her injuries will be *totally redressed* if she prevails.

First, in *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), this Court reviewed an Arkansas statute that granted an exemption from the state sales tax for "newspapers and religious, professional, trade and sports journals," but that did not also exempt "general interest magazines," such as the one published by the Arkansas Writers' Project. The state tax commissioner argued that the Project lacked standing to sue because its injury would not be redressed: if the exemption were held to violate the First Amendment, the exemption would fall, not the tax on general interest magazines.[13] The Court squarely rejected this argument: "We do not accept the Commissioner's notion of standing, for it would effectively insulate underinclusive statutes from constitutional challenge, a proposition we squarely rejected in *Orr v. Orr*, 440 U.S. 268, 272 (1979)." *Id.* at 227. The holding of the court below on Plaintiff Keeler's standing conflicts directly with this Court's holding because it denies standing to a plaintiff who is challenging

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expressed his or her views on abortion. Moreover, under this theory a state would never be able to close a forum for speech. This is not the case. *See, e.g., Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1394 (11th Cir. 1993) (state could close the forum of the state capitol rotunda instead of allowing Jewish group to display a menorah).

[13] The Arkansas Supreme Court had already held, as a matter of state law, that if the exemption were "invalid, as discriminatory," then "the exemption would fall, not the tax against" the Project's magazine. *See id.* at 226 (quoting *Ragland v. Arkansas Writers' Project, Inc.*, 698 S.W.2d 802, 803 (Ark. 1985)).

unequal treatment of her speech simply because the remedy for the inequality may involve eliminating the inequality rather than enabling her speech. Like the argument of the tax commissioner in *Ragland*, the opinion of the court below would effectively insulate Louisiana's blatant viewpoint discrimination from federal constitutional review.

Similarly, the opinion of the court below conflicts with the plurality opinion in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (opinion of Brennan, J., Marshall & Stevens, JJ.).[14] In *Bullock*, this Court considered a Texas statute, in effect for a period of three years, under which the plaintiff, a general interest magazine, "was required . . . to collect and remit to the State the applicable sales tax on the price of qualifying subscription sales." *Id.* at 6. Texas law exempted religious publications from this tax, and the plaintiff challenged the exemption on Establishment Clause and Free Press Clause grounds. Texas argued that the magazine lacked standing because "the proper course under state law would be to remove the exemption for religious publications, rather than extend it to nonreligious periodicals or strike down the sales and use tax in its entirety. If Texas is right, appellant cannot obtain a refund of the tax it paid under protest. Nor can it qualify for injunctive relief, because its subscription sales are no longer taxed." *Id.* at 8. Yet, even though no injunctive relief would confer any tax benefits on the plaintiff, this Court held that it nevertheless had standing under *Ragland*. Thus, in both *Ragland* and *Bullock* this Court found redressability even though the ultimate result of a holding of unconstitutionality could well be that the plaintiff remained in the same position it was originally -- *but for the removal of favorable treatment for others similarly situated*, which this Court found to be sufficient redress. The opinion of the court

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[14] Although the standing holding of *Bullock* is nominally the opinion of only three Justices, no other Justice disagreed with the plurality's conclusion that plaintiff Texas Monthly had standing.

below conflicts with this entire line of this Court's precedent. *See also Legal Services Corp. v. Velazquez*, 531 U.S. 533, 559 (2001) (Scalia, J., dissenting) (in challenge to statutory restriction on ability of legal services lawyers to challenge constitutionality of welfare restrictions on behalf of their clients, Justice Scalia argued that, given the Court's conclusion that the restriction constituted impermissible viewpoint discrimination, the Court should have redressed the viewpoint discrimination by striking the entire Legal Services Corporation Act);[15] *Cox v. Louisiana,* 379 U.S. 559, 575, 581 (1965) (Black, J., concurring in part and dissenting in part) ("I have no doubt about the general power of Louisiana to bar all picketing on its streets and highways. . . . But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets.").

Second, the decision of the court below conflicts with this Court's decisions in a line of equal protection cases involving underinclusive statutes.[16] In *Heckler v. Matthews*, 465 U.S. 728 (1983), Matthews and his wife challenged an exception to a provision of the 1977 Amendments of the Social Security Act. Under the general provision, the spousal

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[15] The majority did not reach the question of remedy having found that the parties did not raise the issue. *Id.* at 549.

[16] It is worth recalling that the First Amendment viewpoint (and content) discrimination analysis is strongly connected with Equal Protection doctrine. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 197 n.3 (1991) ("Content-based restrictions also have been held to raise Fourteenth Amendment concerns because, in the course of regulating speech, such restrictions differentiate between types of speech"); *Cox v. Louisiana*, 379 U.S. 559, 581 (Black, J., concurring in part and dissenting in part) ("Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets . . . This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments . . . [it is] invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.").

benefits of state and federal employees would generally be reduced by the amount of government pensions they received. *Id.* at 732. This provision had been applied to Matthews so as to reduce to zero his spousal benefits. *Id.* at 735. The exception, however, "exempted from the pension offset requirement as ultimately enacted those spouses who were eligible to receive pension benefits prior to December 1982 and who would have qualified for unreduced spousal benefits under the Act as it was administered in January 1977." *Id.* at 733. As of January of 1977, "benefits were payable only to those husbands or widowers who could demonstrate dependency on their wage-earning wives for one-half of their support. Wives and widows, on the other hand, were entitled to spousal benefits without any such showing of dependency on their husbands."[17] *Id.* Matthews thus did not qualify for the exception to the pension offset provision because he could not demonstrate dependency on his wife. *Id.* at 735.

The government challenged Matthews standing due to a severability clause in the 1977 Amendments. Under this clause, the exemption for individuals eligible for spousal benefits would, if invalidated, be stricken as a whole; in other words, "the clause, if valid, would require nullification of the exception as to all persons, rather than extension of the exception to persons like appellee." *Id.* at 736. The government argued that this severability clause deprived Matthews of standing because, if he were successful on the merits of his claim that the exception impermissibly discriminated based on sex, he would still be subjected to the

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[17] This provision imposing a dependency requirement on husbands and widowers but not on wives and widows was held by this Court to violative the Equal Protection Clause in a series of decisions. *Califano v. Goldfarb*, 430 U.S. 199 (1977) (striking dependency requirement for widowers); *Califano v. Jablon*, 430 U.S. 924 (1977) (striking dependency requirement for husbands) (striking dependency requirement for widowers); *Califano v. Siblowitz*, 430 U.S. 924 (1977) (same).

pension offset provision; he would thus accrue no tangible financial benefit from a holding of unconstitutionality, and his injury would not be redressed. This Court rejected the government's argument:

> [W]e have never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class. To the contrary, we have noted that a court sustaining such a claim faces "two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion."

Id. at 738 (quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result)). The ruling of the court below as to the standing of Petitioner Keeler conflicts directly with this holding of *Heckler*, because the court below holds that Keeler's injury can only be redressed by enlarging the forum established by the Act, directing that the forum never be opened (i.e., "declar[ing] the statute a nullity and order[ing] that its benefits not extend to the class [of anti-choice speakers] that the legislature intended to benefit").[18]

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[18] Assuming *arguendo* that the court below had jurisdiction to consider the standing of Planned Parenthood, its holding that Planned Parenthood lacks standing because its injury will not be redressed if the Act is declared unconstitutional is also in conflict with this Court's decision in *Heckler*, and with the other decisions described below. Moreover, the conflict is compounded because the court of appeals failed to observe that the Act could be broadened to include Planned Parenthood simply by severing the unconstitutional restriction on grantees. The question of what remedy to impose is not, of course, determined by the parties, but by

Several other opinions of this Court echo *Heckler*'s holding. Thus, in *Westcott*, cited by *Heckler*, this Court discussed at length how an underinclusive government program, such as Louisiana's Choose Life license plate program, can be remedied either by extension of the program or by nullification of the program. *See Westcott*, 443 U.S. at 89-91. At issue in *Westcott* was a program that provided benefits to families whose dependent children had been deprived of parental support because of the unemployment of the father but denied benefits in case of unemployment of the mother. The Court in *Westcott* did not even hint that nullification of the program would deprive the excluded person of standing because that person's injury would not be redressed. Indeed, four Justices in *Westcott* agreed that both extension and nullification were possible remedies, but

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the district court in the first instance. Fed. R. Civ. P. 54(c) ("every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."). Thus, the court of appeals should have considered forms of relief other than an injunction against the Act in its entirety, including the option of severing from the Act the clause that prohibits Planned Parenthood from receiving grants based on the speech it undertakes with non-government funds. Indeed, federal courts routinely sever unconstitutional portions of state statutes even if the plaintiff does not request severance, and even when the plaintiff would prefer nullification of the statute as a whole. *See, e.g. Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996).

Furthermore, as this Court's opinion in *Heckler* notes: "Although the choice between 'extension' and 'nullification' is within the 'constitutional competence of a federal district court,' . . . ordinarily 'extension, rather than nullification, is the proper course . . .'" *Id.* at 739 n.5 (quoting *Califano v. Westcott*, 443 U.S. 76, 91, 89 (1979)). The court below *insisted* upon nullification as the appropriate remedy for Planned Parenthood's injury, with the result that it erroneously concluded that Planned Parenthood lacked standing. *See Westcott*, 443 U.S. at 96 n.2 (Powell, J., concurring in part and dissenting in part) ("A court no less is 'infringing legislative prerogatives,' when it acts [to choose a remedy] at the behest of the particular litigants before it, than when it chooses a remedy on its own initiative.") (citation omitted).

disagreed with the majority that extension was appropriate, instead finding that nullification was more consistent with Congressional intent. *See* 443 U.S. at 93-96 (Powell, J., concurring in part and dissenting in part). If both are possible remedies, it follows that either redresses the injury.

Similarly, in *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980), this Court considered a Missouri statutory scheme that denied a widower benefits on his wife's work-related death unless he was either mentally or physically incapacitated or proved dependence on his wife's earnings, but granted a widow death benefits without her having to prove dependence on her husband's earnings. This Court held that the scheme violated the Equal Protection Clause of the Fourteenth Amendment, and remanded the case to the Missouri courts to determine "whether the defect should be cured by extending the presumption of dependence to widowers or by eliminating it for widows." *Id.* at 152. Once again, this Court did not hesitate to hold a discriminatory government program unconstitutional even though the ultimate result of that holding might be that the plaintiff alleging unconstitutionality would receive only the benefit of no longer being subject to discrimination.

Thus, the redressability holding of the court below conflicts with this Court's redressability holdings in cases involving underinclusive statutes like the Act. Barring a plaintiff from challenging an underinclusive statute simply because the remedy may require nullification of the statute would mark a radical departure from this Court's carefully crafted approach to remedying underinclusive laws, both those that violate the First Amendment and those that violate the Equal Protection Clause. In addition, it conflicts with decisions of other courts of appeals that have adhered to this Court's standing analysis in *Heckler*.[19] Accordingly,

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[19] For example, in *Jacobs v. Barr*, 959 F.2d 313 (D.C. Cir. 1992), the D.C. Circuit considered a lawsuit by an American of German ancestry

certiorari should be granted to resolve these conflicts regarding this important question of federal standing doctrine. *See* Sup Ct. R 10(a),(c).

VIII. The Opinion of the Court Below Denying Petitioners' Standing to Challenge the Act On Establishment Clause Grounds Conflicts With Decisions of this Court Recognizing Broader Standing Under the Establishment Clause.

This Court has long recognized special standing rules governing claims made under the Establishment Clause in recognition of the special protections that Clause provides against government spending that advances religion. *Flast v. Cohen*, 392 U.S. 83 (1968). The decision of the court below rejecting the standing of Petitioners Henderson, Keeler and Loewy as state taxpayers to mount an Establishment Clause challenge to the Act conflicts with the consistent recognition by this Court and by other United States courts of appeals that state taxpayers have standing to challenge government schemes that advance religion if those schemes involve expenditure of state tax revenues.[20]

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who had been interned in 1945 by the United States. Mr. Jacobs claimed that a federal statute compensating Japanese-Americans for similar internment during World War II violated his right to equal protection of the law. The court rejected the argument that the plaintiff's injuries were not redressable. Following *Heckler* and *Westcott*, the court wrote:

> In this case, a court could order the benefits of the Civil Liberties Act to be extended to Mr. Jacobs, or it could declare the statute a nullity. Congress would then either rewrite the Act to include German Americans in Mr. Jacobs's class, or it would discard the legislation. In either case, the equal protection violation would be redressed.

Id. at 317 (citing *Westcott*).

[20] The court below also held that Reverend Eugene LaMothe lacked standing. Because LaMothe was only added as a plaintiff after the notice of interlocutory appeal was filed, the court of appeals lacked jurisdiction to review his standing. *See supra* at 12-15. Nevertheless, Petitioners

To demonstrate standing, plaintiffs are typically required only to allege that taxpayer dollars are being used in violation of the Establishment Clause. *See Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (implicitly recognizing state taxpayer standing in case brought by state taxpayers challenging delegation of authority to establish school district to a religious sect); *Freedom From Religion Found. Inc. v. Bugher*, 249 F.3d 606, 610 (7th Cir. 2001) (state taxpayer standing was established by showing that taxpayer dollars supported an allegedly unconstitutional program); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 405 (2d Cir. 2001) (holding that a state taxpayer had standing to challenge the inclusion of religious counseling in state-funded alcohol recovery programs because the plaintiff established "'a logical link between [his status as a taxpayer] and the type of legislative enactment attacked' as well as 'a nexus between that status and the precise nature of the constitutional infringement alleged.'") (quoting *Flast*, 392 U.S. at 102); *Johnson v. Econ. Dev. Corp. of the County of Oakland*, 241 F.3d 501, 507-09 (6th Cir. 2001) (state taxpayer had standing to challenge the state's issuance of tax-exempt bonds to a religious entity because the tax exemption would result in a loss of state funds); *Minnesota Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1358 (8th Cir. 1989) (holding that to establish standing, "state taxpayers must only show that there has been a disbursement of tax money in potential violation of constitutional guarantees."). *See also Bowen v. Kendrick*, 487 U.S. 589, 619 (1988) ("[We] have not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges, even when their claims raised questions about the administratively made grants").

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recognize that if the Establishment Clause claims of the other plaintiffs are indistinguishable from LaMothe's, and thus his claim will rise or fall with theirs.

Here, the Act's scheme creates a "symbolic union" of the State of Louisiana with fundamentalist Christianity via the delegation of governmental powers to fundamentalist Christian organizations. *See Larkin v. Grendel's Den*, 459 U.S. 116, 125 (1982). If this symbolic union is implemented, state tax revenues will be spent and religion will thereby be *per se* advanced.

State tax revenues are expended on the implementation of the Act in two ways. First, the fees paid by private car owners to obtain license plates cover only a portion of the costs of administering the Act. § 463.61(C) (A-56). Second, *all* the fees paid by private car owners are made available for grants only "[a]fter compliance with the requirements of Article VII, Section 9(B) of the Constitution of Louisiana relative to the Bond Security and Redemption Fund . . ." § 463.61(F) (A-58).[21] In other words, the fees paid by car owners are first and foremost to be directed to Louisiana's bond obligations. *See* Defendants-Appellants' Memorandum in Opposition to Petition for Rehearing En Banc at 5 ("the monies received [under the Act] must be deposited into the Bond Security and Redemption Fund and will not be available until they are declared surplus after the annual bond and similar long-term obligations of the state are paid."). Thus, expenditure of fees collected from car owners on grants under the Act will reduce state funds available for other purposes. *See Econ. Dev. Corp. of the County of Oakland*, 241 F.3d at 507-09 (state taxpayer had standing to challenge the state's issuance of tax-exempt bonds to a religious entity because the tax exemption would result in a loss of state funds).

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[21] The cited section of the Louisiana Constitution provides: "In each fiscal year an amount is allocated from the bond security and redemption fund sufficient to pay all obligations which are secured by the full faith and credit of the state and which become due and payable within the current fiscal year, including principal, interest, premiums, sinking or reserve fund, and other requirements." La. Const. art. VII, § 9(B).

The court below, having no briefing of Petitioners' Establishment Clause claim before it because the merits of that claim were not essential to reviewing the district court's preliminary injunction, *see supra* at 12-13, *speculated* about the Establishment Clause injury Petitioners asserted: "The argument advanced by these plaintiffs is that because the Choose Life Council is to be comprised of individuals who belong to organizations that allegedly espouse Christian ideologies, the actions taken by the Council, *presumably with regard to the manner in which the Choose Life Fund is distributed*, will either advance Christianity or will otherwise interfere with their own religious beliefs or principles." 287 F.3d at 380 (A-8) (emphasis added). This speculation is ill-founded and is a stark reminder of the grave risks an appellate court takes when it reaches out *sua sponte* to dismiss a claim that has not been briefed by the parties and over which it lacks jurisdiction. *See supra* at 12-15. Had the court below even requested briefing on the nature of Petitioners' Establishment Clause claim before ordering its dismissal, it would have had no need to "presume" to understand the nature of the claim.

First, Petitioners do *not* allege simply that the Choose Life Council "is to be comprised of individuals who belong to organizations that *allegedly espouse* Christian ideologies." Rather, Petitioners have alleged, and this allegation must be taken as true, *see Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."), that the Council is comprised of representatives of pervasively sectarian organizations. Amended Complaint, ¶¶ 21-24 ("The mandatory members of the Council . . . subscribe to and promote fundamentalist Christian beliefs."). Second, and more importantly, Petitioners do not allege that the "actions taken by the Council . . . with regard to the

manner in which the Choose Life Fund is distributed" will advance Christianity.[22] Instead, Petitioners have argued that Council has been improperly given governmental powers, and that the scheme under which it will exercise these powers involves disbursement of state taxpayer funds. In other words, the gravamen of Petitioners' Establishment Clause claim is that state taxpayer money will be spent on the operation of a statute that impermissibly fuses religion with government. That the Council itself does not receive compensation or reimbursement for performing governmental duties is not relevant, because the state officials (like the State Treasurer) who are required to work with and cooperate with the Council *do* receive compensation and reimbursement for the duties they perform under the Act.[23] And the very nature of the Act is to delegate control over state tax revenues to the Council. If state taxpayer revenue is expended on any aspect of the Act's joint exercise of government power by the Council and state officials, then Petitioners' right to be free of a union of Church and State is violated.

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[22] It may in fact be the case that the Council will, if the Act is implemented, steer grants to other fundamentalist Christian entities, but such a claim would probably be an "as applied" challenge to the statute as implemented. But Petitioners' facial challenge is more accurately described as challenging the fact *that* the Council has any role in the distribution of funds, or any role under the Act at all, *regardless* of "the manner" in which it exercises that role. *See Larkin*, 459 U.S. at 118 (delegation of governmental power to churches held unconstitutional even in absence of evidence that the churches exercised their power in a manner that promoted religion).

[23] For example, the Act assigns the State Treasurer and the Council *jointly* the duty of reviewing "the distribution and expenditure of funds under" the Act; and the State Treasurer shall receive recommendations from the Council as to which organizations should receive grants under the Act and must base his decision on those recommendations. § 463.61(G) (A-59).

Because the court below miscomprehended the nature of Petitioners' Establishment Clause claim and their asserted injury, it wrongly rejected their standing as state taxpayers. Thus, once properly understood rather than surmised, Petitioners Henderson, Keeler and Loewy have standing as state taxpayers to bring an Establishment Clause claim against the Act. The ruling of the court below conflicts with this Court's precedents and the above-cited precedents from other courts of appeals recognizing state taxpayer standing to challenge the expenditure of state funds in violation of the Establishment Clause.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

RUSSELL J. HENDERSON;
DOREEN KEELER; ROBERT H. LOEWY
and GREATER NEW ORLEANS
SECTION OF THE NATIONAL COUNCIL
OF JEWISH WOMEN,
Plaintiffs-Appellees,

v. No. 00-31171

RICHARD J. STALDER, Secretary,
Department of Public Safety and
Corrections; JOHN KENNEDY,
State Treasurer,
Defendants-Appellants.

March 29, 2002.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before DAVIS and JONES, Circuit Judges, and BARBOUR, [1] District Judge.

BARBOUR, District Judge:

The Secretary of the Department of Public Safety and Corrections and the Treasurer of the State of Louisiana bring this appeal to challenge the Order of the district court which granted a preliminary injunction in favor of Appellees and thereby halted the implementation of Louisiana Revised Statute 47:463.61, which authorizes a prestige license plate bearing a "Choose Life" message. We find that the Appellees lacked standing to challenge the constitutionality of La. Rev. Stat. 47:463.61. We therefore reverse the district court, vacate its preliminary injunction and remand with instruction to dismiss the complaint.

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[1] District Judge of the Southern District of Mississippi, sitting by designation.

I.

The Plaintiff-Appellees, Russell J. Henderson, Doreen Keeler, Robert H. Loewy, and Greater New Orleans Section of the National Counsel of Jewish Women ("NCJW") [2] instituted this suit against the Secretary of the Department of Public Safety and Corrections and the Treasurer of the State of Louisiana, seeking a declaration that La. Rev. Stat. 47:463.61 is unconstitutional and an injunction prohibiting its enforcement. The challenged law established a "Choose Life" automobile license plate for private automobiles, provided there are a minimum of one hundred applicants for the plate. The annual fee for the Choose Life plate is $25.00 which is paid in addition to the usual yearly motor vehicle licensing fee. An additional $3.50 handling fee is charged to offset administrative costs.

Under the statute, the $25.00 fee will be deposited into the state treasury and thereafter distributed based on recommendations of the "Choose Life" Advisory Council ("Council"). The Council, comprised of the president or designee of the American Family Association, the Louisiana Family Forum, and the Concerned Women of America organizations, is responsible for reviewing grant applications and making recommendations with regard to the manner in which funds should be distributed. Distribution of the funds generated by the Choose Life license plate must be made to tax-exempt organizations which provide "counseling and other services intended to meet the needs of expectant mothers considering adoption for their unborn child" or "to meet the needs of infants awaiting placement with adoptive parents." Organizations "involved in, or associated with counseling for, or referrals to, abortion clinics, providing abortion-related procedures, or pro-abortion advertising" are disqualified from receiving funds generated by the Choose Life plate.

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[2] Eugene LaMothe and Planned Parenthood of Louisiana were added as plaintiffs to the case subsequent to the interlocutory appeal. Although not named parties to the appeal, we have considered whether these later added plaintiffs have standing to challenge the constitutionality of the Choose Life statute.

Plaintiffs filed a lawsuit challenging the constitutionality of La. Rev. Stat. 47:463.61 in the United States District Court of the Eastern District of Louisiana. Specifically, they allege that the subject statute abrogates their right to free speech, constitutes an impermissible establishment of religion, and denies them their right to due process in violation of the First and Fourteenth Amendments to the United States Constitution. Plaintiffs sought a declaratory judgment that La. Rev. Stat. 47:463.61 is unconstitutional and an injunction against its enforcement. On August 23, 2000, a hearing on the Motion for Preliminary Injunction was held before United States District Judge Stanwood R. Duval, Jr. In the Order and Reasons, entered on August 29, 2000, the district court found that the plaintiffs had failed to show that a preliminary injunction should issue with regard to their Establishment Clause claim. The district court, however, found that the plaintiffs established a likelihood of success on the merits of their free speech claim.

Before the district court, plaintiffs argued that La. Rev. Stat. § 47:463.61 violates the First Amendment to the United States Constitution because it discriminates based on viewpoint by allowing only the "pro-life" viewpoint to be expressed via special license plates and pro-choice car owners are not given the option of expressing their view on their license plates. Defendants argued that the Choose Life license plate constitutes an expression of "state speech" and, therefore, did not create a forum for private speech. The district court rejected the argument of the defendants. The district court concluded that prestige license plates are "speech" for the purpose of First Amendment analysis and that they constitute a non-public forum thereby requiring the State to maintain view-point neutrality with regard to the messages displayed. The district court then concluded that as "the State has taken the position that [the 'Choose Life'] message is its own ... it appears at this juncture that the State fails in its responsibility to provide a viewpoint-neutral forum, and [La. Rev. Stat. 47:463.61] will probably be found to be an unconstitutional violation of the First Amendment right to free speech." [3]

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[3] *Henderson, et al. v. Stalder, et al.*, 112 F. Supp. 2d 589, 599 (E.D. La. 2000).

The district court also rejected the defenses raised by the defendants. In deciding the merits of defendants' ripeness argument, the court found that the case was ripe for adjudication as the State, by statutorily authorizing the display of prestige license plates, had created a non-public forum which allowed for viewpoint discrimination. On the defense of standing, the district court did not focus its analysis on whether plaintiffs had established standing to challenge the constitutionality of the Choose Life statute. Instead, the court held that: "Once free speech has been abridged in such a manner, there is no case law supporting the proposition that those individuals whose speech has been restrained in this particular forum must wait ... to have an opportunity to express an opposing viewpoint in that forum." [4] As such, the court concluded it unlikely that the defenses raised by the defendants would be recognized.

The district court, having concluded that the plaintiffs had established a likelihood of success on the merits of their free speech claim and that it was unlikely that the defenses raised were cognizable, granted a preliminary injunction thereby (1) enjoining the enforcement and implementation of La. Rev. Stat. § 47:463.61 and (2) halting production of the Choose Life license plate. Defendants appeal from the order granting the preliminary injunction.

II.
Standing

Under the dictates of Article III of the United States Constitution, federal courts are confined to adjudicating actual "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1. Of the doctrines that have evolved under Article III, including standing, mootness, ripeness, and political question, the requirement that the litigant have standing is perhaps the most important. *See Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 3324 (1984). This doctrine:

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[4] *Id.* at 601.

> [E]mbraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Id. 468 U.S. at 741, 104 S. Ct. 3315 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75, 102 S. Ct. 752, 760 (1982)). Standing, at its "irreducible constitutional minimum," requires a plaintiff "to demonstrate: they have suffered an 'injury in fact'; the injury is 'fairly traceable' to the defendant's actions; and the injury will 'likely ... be redressed by a favorable decision.'" *Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir.2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992)). "[A]n injury in fact [is] an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136.

In the case *sub judice*, the plaintiffs allege different injuries all of which they contend arise because of the enactment of the Choose Life statute. It is on these injuries that standing must be predicated. We now consider whether any of the plaintiffs have alleged an injury in fact, which is fairly traceable to the Choose Life statute that will be redressed in the event that statute is enjoined and/or declared unconstitutional.[5] We will discuss each basis for standing separately.

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[5] This court is obliged to raise the jurisdictional issue of standing *sua sponte* despite the parties' failure to raise it. Moreover, the plaintiffs' skeletal allegations--e.g., that they are state income taxpayers; that Keeler wants to purchase a license plate expressing pro-choice views; and that Loewy's and LaMothe's "religious beliefs are harmed by the statute"--do not require further development in order to assess their standing to challenge the statute.

1. Taxpayer Standing

Plaintiffs Henderson, Keeler, Loewy, and LaMothe, all of whom allege that they pay income tax to the State of Louisiana, allege injury based on the use of their tax money (1) to make and distribute the Choose Life license plate and (2) for the administration of the Choose Life statute including the establishment and maintenance of the Choose Life Council and Fund. The United States Supreme Court has held that state taxpayers, like federal taxpayers, ordinarily lack a sufficient personal stake to challenge laws of general applicability, since their own injury is not distinct from that suffered by taxpayers in general. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 614, 109 S. Ct. 2037, 2043 (1989) (plurality opinion) (citing *Frothingham v. Mellon*, 262 U.S. 447, 487, 43 S. Ct. 597, 601). Therefore, in cases in which a state taxpayer challenges the constitutionality of a state law, he "must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, not merely that he suffered in some indefinite way in common with people generally." *Doremus v. Board of Educ. of Hawthorne*, 342 U.S. 429, 434, 72 S. Ct. 394, 397, 96 L. Ed. 475 (1952).

In the case *sub judice*, the state taxpayer plaintiffs first allege injury in the form of the use of their state income tax dollars to manufacture and distribute the Choose Life license plate. We find that this allegation is insufficient for standing purposes as it does not show that the state taxpayer plaintiffs have sustained or will sustain a direct pecuniary injury, i.e. an injury in fact, because of the manufacture or distribution of the Choose Life license plate. This conclusion is predicated, in part, on the fact that there is no suggestion that the prestige license plates cost more for the State to manufacture or distribute to motor vehicle drivers than do non-prestige license plates. Second, motorists who elect to use the Choose Life license plate are required to pay the regular motor vehicle license fee when registering their vehicles and an additional charge of $3.50 to offset the administrative costs associated with the issuance of the prestige license plates. *See* La.

Rev. Stat. § 47:463(A)(3) (requiring payment of $3.50 handling charge to "offset the administrative costs of the department for the issuance of [prestige license] plates."). Third, the state taxpayer plaintiffs have not alleged that the amount they pay to the State in the form of income taxes will increase because of the enactment of La. Rev. Stat. § 47:463.61. We conclude that the injury complained of by the state taxpayer plaintiffs, i.e., the use of tax dollars to manufacture and/or distribute the Choose Life license plate, is insufficient to confer standing as the injury complained of is, at best, speculative and, at most, constitutes a generalized grievance common to all tax payers in the state.

The state taxpayer plaintiffs also allege injury based on the use of their tax dollars to administer the provisions of La. Rev. Stat. § 47:463.61, which requires the establishment and maintenance of the attendant Choose Life Council and Fund. This "injury" must be read in conjunction with the allegations of plaintiffs Loewy, LaMothe, and Greater New Orleans Section of the National Council of Jewish Women ("NCJW") which allege that the Choose Life statute impermissibly advances Christian fundamentalism. In this context, it appears that the injury complained of by the state taxpayer plaintiffs arises because of alleged use of their state income tax dollars to administer a statute which violates the Establishment Clause.

Plaintiffs Loewy, LaMothe, and the NCJW allege that they will be injured by the implementation of La. Rev. Stat. 47:463.61 as that statute harms their religious beliefs and/or principles and endorses Christian fundamentalism. In support of this assertion, these plaintiffs argue that the mandatory members of the Choose Life Council belong to organizations, namely the American Family Association, the Louisiana Family Forum, and the Concerned Women for America, all of which allegedly espouse a belief in Christianity as evidenced by statements contained on their respective internet web sites.

We have consistently recognized that the injury alleged by a plaintiff for standing purposes must be "'concrete and particularized and ... actual or imminent, not conjectural or

hypothetical to pass constitutional muster." *Association of Cmty. Orgs. for Reform v. Fowler*, 178 F.3d 350, 358 (5th Cir.1999) (quoting *Lujan*, 504 U.S. at 560-61, 112 S. Ct. at 2136). We find the Establishment Clause challenge by Loewy, LaMothe, and the NCJW is predicated on an injury based in conjecture and, therefore, insufficient for federal standing purposes. The argument advanced by these plaintiffs is that because the Choose Life Council is to be comprised of individuals who belong to organizations that allegedly espouse Christian ideologies, the actions taken by the Council, presumably with regard to the manner in which the Choose Life Fund is distributed, will either advance Christianity or will otherwise interfere with their own religious beliefs or principles. There is, however, no allegation that the mandatory members of the Council have yet distributed any money from the Choose Life Fund or that in so doing, or contemplating distributions, they have actually advanced the religious ideologies of their respective organizations or religion in general. At best, the focus of the alleged injury complained of by these plaintiffs arises because of an appearance of future impropriety, which we have found insufficient to confer standing. *Bomer*, 274 F.3d at 218. Accordingly, we find that plaintiffs Loewy, LaMothe and NCJW, in alleging injury based on the manner in which the Choose Life statute would be administered, have failed to allege "an injury in fact" and, therefore, lack standing to challenge the facial constitutionality of that statute. [6] We turn now to the complained of injury to the state taxpayer plaintiffs.

The state taxpayer plaintiffs allege that they will be injured by the use of their income tax dollars to administer the provisions of the Choose Life statute. We have held that to establish taxpayer standing to challenge the constitutionality of a state statute on the basis of the Establishment Clause, a party must show that "tax revenues are expended on the disputed practice." *Doe v.*

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[6] The unavailability of a facial challenge does not imply, of course, that an as-applied challenge at some future date after implementation of this statute would be foreclosed.

Duncanville Ind. Sch. Dist., 70 F.3d 402, 408 (5th Cir.1995). [7] The terms of the Choose Life statute contradict the plaintiffs' allegation that state income tax dollars would be used for the administration of either the Choose Life Council or the Choose Life Fund. Under the statute, members of the Council serve on a voluntary basis and are not provided "compensation or reimbursement of any type." La. Rev. Stat. § 47:463.61 (E)(1). Additionally, the statute requires the payment of an additional $3.50 fee, in addition to the regular motor vehicle license fees, to offset a portion of the associated administrative costs. *Id.* at § 47:463.61(C). Under these facts, we find that the complained of injury of the state taxpayer plaintiffs, i.e., use of their income tax dollars to administer the Choose Life statute, is insupportable and, therefore, insufficient to confer standing to challenge the constitutionality of that statute.

2. Individual Standing

Plaintiff Keeler alleges injury based on the enactment of La. Rev. Stat. 47:463.61 in that "there is no similar 'Pro-Choice' prestige license plate to allow her to express her pro-choice view on her passenger car license plate." [8] We find that this alleged injury fails under the third requirement for federal standing purposes.

To establish standing to challenge the constitutionality of a statute, a plaintiff must show that the injury about which he complains will "likely ... be redressed by a favorable decision" of the court. *Lujan*, 504 U.S. at 560- 61, 112 S. Ct. at 2136. The injury complained of by Keeler is that she has been denied the opportunity to express her pro-choice point of view. The relief requested by Keeler is a declaratory judgment that La. Rev. Stat. §

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[7] Unlike the general test for taxpayer standing, which requires "direct injury" to the taxpayer, *See ASARCO, supra*, the Supreme Court's test in Establishment Clause cases requires only income taxpayer status and the showing of a direct expenditure of income tax revenues on the allegedly unconstitutional program. *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942 (1962).

[8] Amended Complaint, 20.

47:463.61 is unconstitutional. We find that even if the Choose Life statute is declared unconstitutional, Keeler's complained of injury would not be redressed as that remedy will not provide Keeler a forum in which to express her pro-choice viewpoint. Instead, the requested relief would merely function to prevent other motor vehicle drivers from expressing their choose-life point of view. As we conclude that Keeler's complained of injury cannot be redressed by a declaration of the court that the Choose Life statute is unconstitutional, we find that she does not have standing to challenge the constitutionality of that statute.

3. Organizational Standing

Plaintiff Planned Parenthood of Louisiana ("PPL") alleges that La. Rev. Stat. 47:463.61 violates its right to speak and to due process of the law in violation of the First and Fourteenth Amendments to the United States Constitution. The injury complained of by this organization is that, by the language of the Choose Life Statute, it is ineligible for grants through the Choose Life Fund because it makes referrals to abortion clinics and engages in pro-choice advertising.

"An organization has standing to sue on its own behalf if it meets the same standing test that applies to individuals." *Fowler*, 178 F.3d at 356 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79, 102 S. Ct. 1114, 1124 (1982)). We find that PPL fails to satisfy the redressibility requirement of Article III standing. The injury complained of by PPL arises from its alleged exclusion from eligibility to receive grants from the Choose Life Fund because it engages in abortion-related activities. The relief requested by PPL in federal court is a declaratory judgment that La. Rev. Stat. § 47:463.61 is unconstitutional. We find that even if the Choose Life statute is declared unconstitutional, the injury complained of by PPL would not be redressed because there would then be no fund from which PPL could seek grants. As we conclude that the injury complained of by PPL would not be redressed by a judicial declaration that La. Rev. Stat. § 47:463.61 is unconstitutional, we find that PPL has not established that it has standing to challenge that statute.

III.

We hold that the plaintiffs in this case have not shown that they have standing to challenge the constitutionality of Louisiana Rev. Stat. § 47:463.61. We therefore find that the preliminary injunction granted by the district court judge must be dismissed for lack of federal court jurisdiction under Article III of the United States Constitution.

The judgment of the district court is REVERSED, VACATED, and REMANDED for an entry of dismissal.

Appendix A

Louisiana Revised Statute 47:463.61 provides:

A. The secretary of the Department of Public Safety and Corrections shall establish a special prestige license plate to be known as the "CHOOSE LIFE" plate, provided there be a minimum of one hundred applicants for such plate. The license plate shall be restricted to passenger cars, pickup trucks, vans, and recreational vehicles. The license plate shall be of a color and design selected by the Choose Life Advisory Council provided it is in compliance with R.S. 47:463(A)(3), and shall bear the legend "Choose Life".

B. The prestige license plate shall be issued, upon application, to any citizen of Louisiana in the same manner as any other motor vehicle license plate.

C. The annual fee for this special prestige license plate shall be twenty-five dollars, in addition to the regular motor vehicle license fee provided in R.S. 47:463, to be distributed in the manner set forth in Subsection F of this Section and a three dollar and fifty cent handling fee to be retained by the department to offset a portion of administrative costs.

D. The department shall collect the fee for the prestige license plate and forward the fee to the state treasurer for immediate deposit on the state treasury.

E. (1) A Choose Life Advisory Council, hereinafter referred to as the "Council", shall be established to design and review grant applications for qualifying organizations, and shall make recommendations regarding the awarding of grants to the state treasurer. Members of the Council shall serve one-year terms, on a voluntary basis, commencing on October 1, 1999, and shall receive no compensation or reimbursement of any type. Council members are hereby authorized to serve successive terms. The Council shall meet at least annually, and shall be comprised of the following members:

(a) The president, or his designee, from the American Family Association.

(b) The president, or his designee from the Louisiana Family Forum.

(c) The president, or his designee, from the Concerned Women for America organization.

(2) At the discretion of the Council, membership may be extended to add members representing the following:

(a) Physicians specializing in obstetrics.

(b) Physicians specializing in pediatrics.

(c) Women who have surrender (sic) children for adoption.

(d) Couples who have adopted children.

(e) Adoption advocacy groups.

(f) Board-certified social workers.

(g) Certified counselors.

F. (1) After compliance with the requirements of Article VII, Section 9(B) of the Constitution of Louisiana relative to the Bond Security and Redemption Fund, an amount equal to the monies received by the state treasury pursuant to provisions of Subsection D of this Section shall be deposited into the Choose Life Fund, which is hereby created as a special fund in the state treasury and hereafter referred to as the "Fund". All unexpected and unencumbered monies in the fund at the end of the fiscal year shall remain in the fund. Monies in the fund shall be invested by the state treasurer in the same manner as monies in the state general fund and interest earned on the investment of such monies shall be deposited into the fund. Monies in the fund shall only be withdrawn pursuant to an appropriation by the legislature solely for the purposes provided by this Section.

(2) An organization wishing to qualify for receipt of funds shall submit an affidavit affirming its qualifications, which shall include a pledge to spend the money in accordance with the provisions of this Section, to the Council and shall qualify as tax exempt under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended. Furthermore, an organization wishing to qualify for receipt of funds shall demonstrate it provides counseling and other services intended to meet the needs of expectant mothers considering adoption for their unborn child. No monies deposited into the fund shall be distributed to any organization involved in, or associated with counseling for, or referrals to, abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising.

(3) Organizations receiving monies under this Section shall use at least fifty percent of such funds to provide for the material needs of expectant mothers considering adoption for their unborn child, including clothing, housing, medical care, food, utilities, and transportation. Such monies may also be used to meet the needs of infants awaiting placement with adoptive parents. The remaining funds may be used for counseling, training, and providing pregnancy testing, but shall not be used for administrative, legal, or capital expenditures.

G. The state treasurer, based on the recommendations of the Council, shall annually disburse from the funds an equal amount to each of the qualifying organizations, and shall make available, upon request, the name and the amount of monies disbursed to each organization. An organization receiving monies from the fund may be required to submit an annual audit prepared by a certified public accountant, at the discretion of the state treasurer and the Council. The state treasurer and the Council shall review the distribution and expenditure of funds under this Section at least once every three years to ensure funds are disbursed and expended in accordance with the provision of this Section.

H. The secretary may establish rules and regulations to implement the provisions of this Section, including but not limited to rules and regulations governing the collection and disbursement of fees, the transfer and disposition of such license plates, the colors available, and the design criteria.

EDITH H. JONES, Circuit Judge, concurring:

I concur fully in Judge Barbour's opinion.[9] I write separately to respond to a few points made by Judge Davis in his dissent, even though the dissent touches only plaintiff Keeler's standing.

I respectfully disagree with Judge Davis. His conceptualization of Keeler's alleged injury would take us far afield from the requirements of Article III of the Constitution. As a general proposition, a plaintiff who complains merely that a benefit has been unconstitutionally granted to others is asserting only a "generalized grievance" that does not allow the plaintiff standing to obtain judicial relief for the alleged wrong in federal court. A plaintiff cannot have standing unless he or she alleges "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324 (1984). An allegation of discriminatory benefit favoring others, without more, cannot meet these requirements.

Part II of the dissent suggests that in a First Amendment facial challenge to a legislative enactment, Article III's requirements of injury-in-fact, causation and redressability need not be met. But these requirements are not optional. "Those who do not possess Art. III standing may not litigate as suitors in the courts of the United States," *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475-76, 102 S. Ct. 752, 760 (1982); and injury-in-fact, causation and redressability are the three essential elements of the "irreducible constitutional minimum of standing" required by Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136,

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[9] We have treated this case as if it involved no more than the First Amendment consequences of the legislature's decisions to allow groups to obtain specialty license plates. The entire program, however, is more complex, involving the transfer of excess revenues from the program to various private groups, such as adoption agencies in the case of the pro-life plates. It might well be contended that the state has adopted a program to foster adoption by means of "selling" specialty plates to like-minded citizens. The appellees' standing would nevertheless founder, in my view, under such an analysis just as it does in Judge Barbour's opinion.

119 L. Ed. 2d 351 (1992).[10] The requirements apply in First Amendment cases no less than in other cases,[11] including cases in which a plaintiff challenges an enactment on its face. *See*, e.g., *Larson v. Valente*, 456 U.S. 228, 233-36, 238-44, 102 S. Ct. 1673, 1677-79, 1680-83, 72 L. Ed. 2d 33 (1982) (holding that plaintiffs had Article III standing to bring Establishment Clause challenge to statute as applied and on its face). [12]

Further, the cases cited in part II of Judge Davis's dissent fail to support his argument. The plaintiffs in those cases actually met the requirements of Article III, including its redressability

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[10] See *Valley Forge Christian College*, 454 U.S. at 472, 102 S. Ct. at 758. See also *Raines v. Byrd*, 521 U.S. 811, 818-20, 117 S. Ct. 2312, 2317-18, 138 L. Ed. 2d 849 (1997).

[11] See, e.g., *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-36, 110 S. Ct. 596, 607-10 (1990); *Meese v. Keene*, 481 U.S. 465, 472-77, 107 S. Ct. 1862, 1866-69, 95 L. Ed. 2d 415 (1987); *Valley Forge Christian College*, 454 U.S. at 488-90, 102 S. Ct. at 767-68; *Society of Separationists v. Herman*, 959 F.2d 1283, 1285 (5th Cir. 1992) (*en banc*); *Doe v. Sch. Bd. of Ouachita Parish*, 274 F.3d 289, 291-92 (5th Cir. 2001).

[12] Although various prudential standing principles have been relaxed in some First Amendment cases, this relaxation does not eliminate the distinct and independent requirement of Article III that the dispute between the parties must amount to a case or controversy. *See Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956-58, 104 S. Ct. 2839, 2846-47 (1984). *See also Valley Forge Christian College*, 454 U.S. at 475, 102 S. Ct. at 760 (satisfaction of requirements of prudential standing cannot substitute for Article III requirements); *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 172 F.3d 397, 407 (6th Cir.1999). Compare *City of Chicago v. Morales*, 527 U.S. 41, 55 n. 22, 119 S. Ct. 1849, 1858 n. 22, 144 L. Ed. 2d 67 (1999) (opinion of Stevens, J., joined by Souter, J., and Ginsburg, J.) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party (*jus tertii*) standing, which we have recognized as a prudential doctrine and not one mandated by Article III of the Constitution.") (citing *Joseph H. Munson Co.*, 467 U.S. at 955, 104 S. Ct. at 2846).

requirement.[13] This is not true of plaintiff Keeler, who seeks a remedy that would not redress her alleged injury.

Part III of the dissent argues that plaintiff Keeler's challenge in this case to La. R.S. 47:463.61 meets the requirements of Article III. The two cases cited for this argument are distinguishable. In *Orr v. Orr*, 440 U.S. 268, 99 S. Ct. 1102 (1979), the appellant sought a ruling that he "not be required to pay alimony if similarly situated wives could not be ordered to pay." *Id.* at 271, 99 S. Ct. at 1107. It was not clear whether he also sought alimony for himself. *Id.* & n. 2. The Supreme Court reversed an unfavorable state court ruling after concluding that Orr had standing to raise his challenge.

The Supreme Court noted that it was "possible" that a favorable ruling for Orr in the Court "will not ultimately bring him relief from the alimony judgment outstanding against him, as the State could respond to a reversal by neutrally extending alimony rights to needy husbands as well as wives." *Id.* at 271, 272, 99 S. Ct. at 1108. Because the Court "ha[d] no way of knowing how the State w[ould] in fact respond" to a ruling striking down the state's alimony laws, Orr had standing. *Id.* To hold otherwise would be "to hold that underinclusive statutes can never be challenged because *any* plaintiff's success can theoretically be thwarted." *Id.* (emphasis in original). The Court went on to say that "[t]he holdings of the Alabama courts stand as a total bar to appellant's relief; his constitutional attack holds the only promise of escape

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[13] In all but one of the cases cited in part II of Judge Davis's dissent, the appellant or appellants who complained of a First Amendment violation had been convicted of violating an ordinance or statute; a favorable decision in the Supreme Court would invalidate the conviction or convictions of each appellant or group of appellants in these cases. The only exception is *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988), in which a newspaper publisher brought a facial challenge to a statute requiring the publisher to obtain a permit before placing its newsracks on public property. The statute obstructed the exercise of the publisher's First Amendment rights; invalidating the statute for unconstitutionality would remove this obstacle. *City of Lakewood* would prove Judge Davis's point if the publisher had sought to obtain an injunction preventing another newspaper from placing newsracks on private property, and if the Court had held that the newspaper had standing to seek the injunction against its rival; but these were not the facts.

from the burden that derives from the challenged statutes." *Id.* at 273, 99 S. Ct. at 1108.

In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987), the Arkansas Writers' Project, Inc. sought a refund of sales taxes it had paid, arguing that a statutory tax exemption must be extended to include a magazine that it published. *Id.* at 225, 107 S. Ct. at 1725. On appeal to the Supreme court, the state revenue commissioner argued that the Project lacked standing to challenge the tax scheme because its claimed injury could not be redressed by a decision of the Court. The Court rejected this view of standing, which "would effectively insulate underinclusive statutes from constitutional challenge, a proposition we soundly rejected in *Orr v. Orr*." *Ragland*, 481 U.S. at 227, 107 S. Ct. at 1726 (citation omitted). In previous decisions, the Court said, it had "considered claims that others similarly situated were exempt from the operation of a state law adversely affecting the claimant." *Id.* Quoting *Orr*'s "only promise of escape" language, the Court concluded that the Project had alleged an adequate personal stake in the outcome of the litigation. 481 U.S. at 227, 107 S. Ct. at 1726-27. The Court held on the merits that the Arkansas "tax"-- not the exemption--violated the First Amendment. 481 U.S. at 234, 107 S. Ct. at 1730.

This case is different from *Orr* and *Ragland* for at least two reasons. First, holding in favor of Keeler in this case would not merely present the "possibility" of a result that would not redress the wrong of which the plaintiff complains. If the relief requested by Keeler is granted, there is *no possibility whatsoever* that the relief will redress any constitutionally cognizable injury-of-fact of which she could be said to complain. Invalidating a statute that, on Keeler's theory, allows third-party anti-abortion speakers to exercise their First Amendment rights in a constitutionally protected forum will do nothing to help Keeler speak within that

alleged forum. [14] The relief sought by Keeler cannot redress the constitutionally cognizable injury of which Keeler complains. *Cf. Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 185, 120 S. Ct. 693, 706, 145 L. Ed. 2d 610 (2000) ("a plaintiff must demonstrate standing separately for each form of relief sought").

Second, Keeler's constitutional attack does not "hold[ ] the only promise of escape from the burden that derives from the challenged statutes." Keeler and the other plaintiffs in this action have challenged only La. R.S. 47:463.61, not the other Louisiana statutes that (either alone or viewed in conjunction with this statute) could be said to constitute the scheme that causes the alleged constitutional violation of which the plaintiffs complain. Only if Keeler challenged the broad scheme for specialty plates would she be in the same position as the appellant in *Orr*. Favorable redress could then result either in the state's allowing her to place pro-choice sentiments on specialty license plates or in the state's shutting down the alleged First Amendment forum by banning, or ceasing to sponsor, all specialty plates. But this is not Keeler's aim.

As a final note, Judge Davis's view of standing would transform the First Amendment into a device for censorship rather than the enhancement of free speech. Under traditional free speech jurisprudence, the remedy for a speaker's unjust exclusion from a forum is to admit the speaker, in other words, to afford Keeler access to specialty plates. *Rosenberger v. Rectos of the Univ. of Virginia*, 515 U.S. 819, 828-30, 845-46, 115 S. Ct. 2510, 2516- 17, 2524-25, 132 L. Ed. 2d 700 (1995). Judge Davis's acceptance of Keeler's concept of injury would lead instead to the removal of a single speaker— reflecting the anti-abortion viewpoint—from the forum, with no corresponding enlargement of speaking opportunity for Keeler. The "redress" sought by Keeler not only fails to repair

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[14] Judge Davis hypothesizes that "a declaratory judgment in Keeler's favor might also have the effect of removing the benefit granted to those who wish to display the Choose Life plate." This is euphemistic: such a declaratory judgment would have such an effect–immediately and without question.

her alleged constitutional deprivation, but it would be, as far as I am aware, unique and fundamentally contrary to the law of free speech.

W. EUGENE DAVIS, Circuit Judge, dissenting:

I disagree with the majority's conclusion that the plaintiffs have no standing to bring their First Amendment challenge to Louisiana's Choose Life statute. I therefore dissent.

I.

The majority holds that plaintiff Keeler lacks standing to challenge La. R.S. 47:463.61 because, even if the Choose Life statute is declared unconstitutional, Keeler's complained of injury would not be redressed because that remedy will not provide Keeler with a forum in which to express her opposing pro-choice viewpoint. In the majority's view, the requested relief would merely function to prevent other motor vehicle drivers from expressing their choose-life point of view.

I would define Keeler's injury in a different manner. The plaintiffs alleged that their rights under the First and Fourteenth Amendments have been violated because the Louisiana Legislature, as part of its specialty license plate program, has enacted the Choose Life statute. This statute allows for expression of the choose life message on state prestige license plates, without allowing for the expression of the opposing pro-choice viewpoint in that same forum. The plaintiffs allege and the State concedes that Louisiana is an anti-abortion state which allows the fact-finder to infer that the Louisiana Legislature will not pass a statute authorizing the expression of a choose choice message. [15] The plaintiffs have alleged and the district court found that the State

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[15] This has been made abundantly clear since this appeal was filed. After the initial briefs were filed in this case, an amendment to the Choose Life legislation was introduced in the last session of the Louisiana Legislature, that, if passed, would have authorized a "Choose Choice" license plate. The amendment was rejected.

has engaged in viewpoint discrimination by authorizing the Choose Life license plate. As a result, plaintiffs are not and will not be given the opportunity to speak their opposing viewpoint in that same forum. In other words, the plaintiffs are injured by the government's promotion of one side of the debate on the abortion rights issue in a speech forum, coupled with the lack of opportunity to present their opposing view. "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' *and government must afford all points of view an equal opportunity to be heard.*"[16]

II.

As the plaintiffs have alleged an injury raising First Amendment concerns, this court may properly apply an expanded notion of standing to determine who may institute a suit for relief.[17] The majority opinion addresses standing utilizing the traditional requirements of injury-in-fact, causation and redressability. Although as discussed below, I would find that plaintiff Keeler satisfies all requirements, that analysis may not be applicable to this case. In *Lakewood v. Plain Dealer Pub. Co.*, the Supreme Court stated specifically,

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[16] *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96, 92 S. Ct. 2286, 2290, 33 L. Ed. 2d 212 (1972)(Emphasis added)(internal citations omitted).

[17] MOORE'S FEDERAL PRACTICE 3D, § 101.61[5][a].

> Recognizing the explicit protection afforded speech and the press in the text of the First Amendment, our cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for and being denied, a license. [18]

In that case, a city ordinance gave the mayor unfettered discretion to grant or deny a permit for placing newspaper dispensing devices on public property. The plaintiff newspaper did not apply for a permit but brought suit to challenge the news rack ordinance. On the issue of standing, the Supreme Court, with no mention of the three requirements listed above, held that the newspaper could bring a facial challenge to the statute without applying for a permit because the requirement of an annual permit is potentially threatening to speech, the license is aimed at expressive conduct and the licensing system threatens freedom of expression because it creates a system by which speech is reviewed without standards.[19] Without standards, speakers denied a license will have no way to prove that a decision against their application was unconstitutionally motivated. Such uncertainty can compel self-censorship when speakers conform their speech to the licensor's preferences.[20] Generally, a facial challenge to a licensing law lies where the law gives a government official or agency substantial power to discriminate based on content or viewpoint of speech by suppressing disfavored speech or speakers and the law has a close nexus to expression. [21]

Although cases under this precedent generally deal with situations in which a single government official is given the discretion under the statute to grant or deny a license affecting

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[18] *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755-56, 108 S. Ct. 2138, 2143, 100 L. Ed. 2d 771 (1988).

[19] *Id.* at 2145-46.

[20] *Id.* at 2145.

[21] *Id.*

expressive activity, I see no reason why the principle should not be applied to this case. [22] Both parties agree that the messages on prestige license plates are speech. Louisiana's ad hoc legislative process for granting or denying authorization for prestige license plates is analogous to a licensing process to obtain access to expressive activity. The process gives the Louisiana Legislature similar unbridled discretion over messages on prestige license plates, which discretion is limited only by the size of the plate itself. Clearly if the decision to authorize specialty plates were being made by a government official or commission under authority delegated by the legislature, the actions of the official or commission would be subject to judicial review. Leaving that

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[22] *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965) ("In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, *whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license*") (emphasis added); *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736, 84 L. Ed. 1093 (1940) (in the First Amendment context, "[o]ne who might have had a license for the asking may ... call into question the whole scheme of licensing when he is prosecuted for failure to procure it"). See also *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969) (" 'The Constitution can hardly be thought to deny to one subjected to the restraints of [a licensing law] the right to attack its constitutionality, because he has not yielded to its demands' " (quoting *Jones v. Opelika*, 316 U.S. 584, 602, 62 S. Ct. 1231, 86 L. Ed. 1691 (1942) (Stone, C. J., dissenting), adopted *per curiam* on rehearing, 319 U.S. 103, 104, 63 S. Ct. 890, 87 L. Ed. 1290 (1943))); *Lovell v. Griffin*, 303 U.S. 444, 452, 58 S. Ct. 666, 669, 82 L. Ed. 949 (1938) ("As the ordinance [providing for unbridled licensing discretion] is void on its face, it was not necessary for appellant to seek a permit under it").

authority directly in the hands of the Louisiana legislature should not change the analysis.[23]

The fact that there is no single statute establishing Louisiana's specialty license plate program does not affect our analysis.[24] In *Niemotko v. Maryland*, no ordinance or statute was in place regulating or prohibiting the use of the park.[25] Rather, a practice had developed vesting authority to grant permits for the use of the park in the Park Commissioner and the City Council. The court stated, "[n]o standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here."[26] Accordingly, the lack of a statute establishing the specialty license plate program should not prevent the plaintiffs from bringing a facial challenge to the State's system for authorizing specialty license plates.

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[23] In *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969), parade permits were issued by the Commission, the city's legislative branch. In that case the ordinance conferred upon the City Commission the power to prohibit any "parade," "procession," or "demonstration" on the city's streets or public ways. In deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience." The Supreme Court decided that this ordinance as it was written, fell squarely within the ambit of many decisions of the Court holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.

[24] La.R.S. 47:463.A.(3) is not such a statute. It merely states that specialty license plates authorized by the legislature "shall contain the uniform alpha-numeric series accompanied by a symbol or emblem representing the organization requesting such a plate." The statute also contains the requirement that plates issued after August 15, 1999 shall include a handling charge of $3.50 and that no plate shall be established after January 1, 2002 until the department has received a minimum of one thousand applications for the plate.

[25] 340 U.S. 268, 272, 71 S. Ct. 325, 95 L. Ed. 267 (1951).

[26] *Id.*

The Choose Life statute is just one application of a policy adopted by the Louisiana legislature to authorize specialty plates on an ad hoc basis. It is clear that attacks against an unwritten policy or practice regarding the issuance of licenses for speech are subject to the same constitutional analysis as an attack on a statute or ordinance and should fall within the same standing analysis set forth in Lakewood. In summary, at its core I view this case as indistinguishable from the decision in Lakewood on the issue of standing. Further, I see no principled reason why plaintiffs raising free speech claims in this case do not have standing to attack the Choose Life statute as a discrete application of Louisiana's policy regarding authorization of specialty license plates. This is the single statute under this program that offends them and I see no reason to require them to challenge the entire specialty license plate program.

III.

Plaintiff Keeler also has standing using the traditional analysis outlined by the majority opinion. Plaintiff Keeler's injury is personal, not a generalized grievance, based on the allegation that she would purchase a prestige license plate expressing her pro-choice views but is unable to do so. Based on these allegations, the harm is fairly traceable to, and the direct result of, the State's conduct. Also, the alleged harm is likely to be redressed by the requested relief. The relief requested is that the court enjoin the implementation of the Choose Life statute and declare it unconstitutional. While this relief will not allow plaintiffs to speak in the specialty license plate forum, it will have the effect of preventing the State from manipulating the content of public debate by presenting only the view favored by the state.

A plaintiff has standing to seek relief in a case such as this when she is aggrieved by a statute, like the Choose Life legislation, that is underinclusive. A person or group excluded from benefits conveyed via an underinclusive statute has standing to challenge the statute on constitutional grounds. This is so even if the effect of striking down the statute is to deny the benefit to the intended group and not extend it to the plaintiffs. For example, in

Orr v. Orr, a man who had been ordered to pay alimony to his wife under state laws providing that husbands, but not wives, may be required to pay alimony upon divorce, had standing to challenge the constitutionality, on equal protection grounds, of such alimony laws, notwithstanding that the man made no claim of being entitled to an award of alimony from his divorced wife but challenged only the unequal status of husbands and wives as to the burden of alimony.[27]

The Supreme Court applied this concept to a free speech claim in *Arkansas Writers' Project, Inc. v. Ragland*.[28] In *Ragland*, the state of Arkansas imposed its personal property tax on receipts from sales of general interest magazines, but exempted receipts derived from the sale of newspapers and religious, professional, trade and sports journals. The publisher of the Arkansas Times, a general interest magazine, contested the assessment of taxes against it on the basis that subjecting the Arkansas Times to the sales tax, while sales of newspapers and other magazines were exempt, violated the First and Fourteenth Amendments. The Arkansas Times is a magazine that includes articles on a variety of subjects, including religion and sports, but which does not qualify for one of the topic based exemptions.

Taking a position similar to that expressed by the majority opinion, the Commissioner of Revenue of Arkansas argued to the Supreme Court that the Arkansas Times did not have standing to challenge the Arkansas sales tax. The Commissioner contended that since the appellant conceded that the Arkansas Times is not a newspaper or religious or sports journal, it had not asserted an injury that could be redressed by a favorable decision of the court. The Commissioner's argument built on the conclusion of the Arkansas Supreme Court that "[I]t would avail [appellant] nothing if it wins its argument ... It is immaterial that an exemption in favor of some other taxpayer may be invalid, as discriminatory. If so, it is the exemption that would fail, not the tax against the [Arkansas]

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[27] 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979).

[28] 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987).

Times. ... [*Ragland v. Arkansas Writers' Project*, Inc., 287 Ark. 155] 698 S.W.2d [802], at 803 [(1985)]."[29] The Supreme Court rejected this argument, stating that such a position "would effectively insulate underinclusive statutes from constitutional challenge, a proposition we soundly rejected in *Orr v. Orr*, 440 U.S. 268, 272, 99 S. Ct. 1102, 2208 (1979)." The fact that a decision in favor of the plaintiff would not result in the sales tax exemption being extended to all publications and would do nothing more than remove the benefit of the exemption from other speakers did not prevent a finding that the appellants had standing. The Court viewed the discriminatory exemption granted to others as a burden on the plaintiffs. The plaintiff's "constitutional attack holds the only promise of escape from the burden that derives from the challenged statut[e]."[30]

The plaintiffs in today's case presents a similar, and even stronger, case for standing. The Choose Life statute, like the sales tax exemption in *Ragland*, grants a privilege related to speech to a select group. In our case, the privilege was granted based on the state's support of the viewpoint expressed in the Choose Life license plate. (There does not appear to be viewpoint discrimination in *Ragland*.) Keeler's standing to bring her claims does not depend on whether the lawsuit seeks to obtain the benefit for herself. It is sufficient, based on *Ragland*, that Keeler seeks to remove the discriminatory benefit favoring others in a speech context. In other words, the State's manipulation of the playing field for speech by the authorization of the Choose Life license plate, like the tax exemption in *Ragland*, is a burden on the free speech rights of Keeler. Removal of that discriminatory program will redress Keeler's alleged injury. Just as it was immaterial in *Ragland* that the effect of declaring the challenged tax exemption invalid might increase the taxes applicable to some publications (possibly creating a burden on speech rights), it is immaterial that a declaratory judgment in Keeler's favor might also have the effect

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[29] *Id.* at 1726.

[30] *Ragland* at 227, 107 S. Ct. 1722, quoting *Orr v. Orr* at 273, 99 S. Ct. 1102.

of removing the benefit granted to those who wish to display the Choose Life plate.

Further, the outcome of this litigation need not result in the authorization of a Choose Choice license plate. As was the case in *Ragland* and *Orr*, plaintiff Keeler may prevail in her quest to declare the Choose Life license plate statute unconstitutional and not achieve authorization from the Louisiana legislature for a Choose Choice license plate.[31] It is sufficient that the plaintiff seek, as does Plaintiff Keeler, to simply remove the discriminatory benefit granted to others and thereby create a level playing field for all affected by the statute. Keeler has alleged a sufficiently personal stake in the outcome of this litigation and this constitutional attack holds the only promise of escape from the burden on her free speech rights that derives from the challenged statute.[32]

IV.

In summary, I would find that plaintiff Keeler has standing to assert her First Amendment claims. Under relaxed standing principles recognized in First Amendment cases, she has standing to bring a facial challenge to the Choose Life statute. This statute is an application of Louisiana's system of permitting the state legislature to authorize specialty license plates without standards or constraints, which in this instance promotes state sponsored viewpoint discrimination. In addition, applying traditional standing analysis, I would hold that Plaintiff Keeler has established a personal injury fairly traceable to the defendant's allegedly unlawful conduct that is likely to be redressed by the requested relief.

In this case, the state sponsored the viewpoint of a select group. This burdened those holding a contrary view who were unable to express their views in the state sponsored forum. As in

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31 *Orr* at 273, 99 S. Ct. 1102, *Ragland* at 1726-27.

32 *Id.*

Ragland, plaintiff's "constitutional attacks holds the only promise of escape from the burden that derives from the challenged statute." Stated differently, the majority's unduly narrow application of standing principles to this First Amendment case precludes any plaintiff from attacking the constitutionality of the Choose Life statute.

Because the majority dismissed this case for lack of standing, the court does not reach the merits of the preliminary injunction. For reasons stated above, I would find that plaintiff Keeler has standing and, on the merits, I would affirm the district court's preliminary injunction, essentially for the reasons stated by the district court and remand for entry of a permanent injunction against the implementation of La.R.S.47:463.61.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA.

No. CIV. A. 00-2237.

RUSSELL J. HENDERSON;
DOREEN KEELER; ROBERT H. LOEWY
and GREATER NEW ORLEANS
SECTION OF THE NATIONAL COUNCIL
OF JEWISH WOMEN,
Plaintiffs,

v.

RICHARD J. STALDER, SECRETARY,
DEPARTMENT OF PUBLIC SAFETY AND
CORRECTIONS; JOHN KENNEDY,
STATE TREASURER,
Defendants.

Aug. 29, 2000.

ORDER AND REASONS

DUVAL, District Judge.

Before the Court is plaintiffs' Motion for Preliminary Injunction sought pursuant to Fed. R. Civ. P. 65(a) and (b)[1] which came for hearing on August 23, 2000. Plaintiffs[2] challenge the constitutionality of La. Rev. Stat. 47:463.61 (the "Act") which creates a "Choose Life" prestige Louisiana license plate and a

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[1] The Court did not order trial of the action on the merits consolidated with the preliminary injunction as is possible under Rule 65(a)(2).

[2] Plaintiffs are Russell J. Henderson, Doreen Keeler, Robert H. Loewy, and the Greater New Orleans Section of the National Council of Jewish Women.

"Choose Life" fund within the state treasury.[3] Plaintiffs contend that a preliminary injunction is necessary because (1) the Act's delegation of a governmental function to Christian fundamentalist organizations violates the Establishment Clause of the First Amendment and (2) in the absence of an injunction, the State of Louisiana (the "State") will be actively engaging in viewpoint discrimination by allowing a pro-life viewpoint to be expressed through license plates, but not a pro-choice view in contravention of the First Amendment right to free speech. For the reasons that follow, the Court finds that a preliminary injunction must issue.

The Act

The Act provides that special "prestige" license plates bearing the legend "Choose Life" shall be established by the Department of Public Safety and Corrections ("the Department") provided there are a minimum of one hundred applicants for such plates. The annual fee for such a plate is $25.00, in addition to the regular motor vehicle license fee plus a $3.50 handling fee "to be retained by the department to offset a portion of the administrative costs."

Under the Act's provisions, the revenue generated by the $25.00 surcharge is deposited into the state treasury to be distributed by the State Treasurer upon the recommendation by a "Choose Life" Advisory Council ("the Council"). These distributions must go to organizations established under section

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[3] The Act states specifically as its purpose:

To enact R.S. 47:463.57, relative to motor vehicles; to provide relative to license plates; to create the "CHOOSE LIFE" prestige license plate; to provide for the issuance of such plate; to provide for a minimum number of applicants; to provide for the design and color of such plate; to provide relative to the fees for such plates; to provide for the creation of the "Choose Life" fund within the state treasury; to provide for the deposit of certain monies into the fund; to provide for the use of such monies; to provide for the qualifications of organizations applying for receipt to such monies; to require annual audit; to create the Choose Life Advisory Council; to provide for membership, terms, duties and pay for members of such Council; to authorize promulgation of rules and regulations; and to provide for related matters.

It should be noted that Act was re-numbered upon codification.

501(c)(3) of the 1954 Internal Revenue Code and which organizations counsel women to place their children up for adoption. The Council is to select the color and design of the plate, is to review grant applications and is to make recommendations about the awarding of the grants. However, the decision with respect to the actual distribution of funds is ultimately to be made by the State Treasurer.

The Council is to be comprised of the president or designee of the American Family Association, the Louisiana Family Forum and the Concerned Women of America organizations. The Council at its discretion may also add members from other specified secular groups.[4] Members of the Council serve for one-year terms, on a voluntary basis. No money is to be distributed to any organization that is involved in or associated with abortion clinics or pro-abortion advertising. Fifty percent of the funds is to be used for the material needs of the expectant mothers considering adoption and the remaining moneys may be used for counseling, training, and providing pregnancy testing but is not to be used for administrative, legal or capital expenditures.

Plaintiffs contend that the Act delegates government functions to Christian fundamentalist organizations, that taxpayer money will be used to administer the Act, that no prestige license plate is available for "pro-choice" citizens and that the statute harms the plaintiffs' religious freedom as the Act places the State's imprimatur on fundamentalist Christian beliefs and advances those beliefs by creating a symbolic union between Christian fundamentalism and the State of Louisiana. As such, plaintiffs argue that a preliminary injunction should be issued to prohibit the defendants, Richard L. Stalder, Secretary, Department of Public Safety and Corrections for the State of Louisiana and John Kennedy, Treasurer for the State of Louisiana from "enforcing or implementing Louisiana House Bill No. 2082, codified at La. Rev.

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[4] Seven groups are delineated: physicians specializing in obstetrics; physicians specializing in pediatrics; women who have surrendered children for adoption; couples who have adopted children; adoption advocacy groups; board-certified social workers; and certified counselors.

Stat. § 47:463.61 (1999) and specifically directing them to halt production of the 'Choose Life' special prestige license plates."

The Court will now turn to the standard it must employ to determine whether a preliminary injunction should issue.

Standard for Preliminary Injunction

A preliminary injunction is an extraordinary equitable remedy that may be granted only if a plaintiff establishes the following four elements:

(1) a substantial likelihood of success on the merits;
(2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is denied;
(3) that the threatened injury outweighs any damage that the injunction might cause defendants; and
(4) that the injunction will not disserve the public interest.

Sugar Busters LLC v. Brennan, 177 F.3d 258, 265 (5th Cir.1999). As such, the decision to grant a preliminary injunction is to be treated as the exception rather than the rule. *State of Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 179 (5th Cir.1975). Plaintiffs must carry the burden of proving all four factors. *Black Fire Fighters Ass'n v. City of Dallas, Tex.*, 905 F.2d 63, 65 (5th Cir. 1990). Thus, the first inquiry is whether plaintiffs have a substantial likelihood of success on the merits.

I. Success on the Merits

A. The Establishment Clause Claim

As noted, plaintiffs contend that the Act delegates governmental functions to Christian fundamentalist organizations and that the three council members subscribe to and actively promote Christian fundamentalist beliefs as set forth in their organization's mission statements. Plaintiffs contend that the Act places the State's imprimatur on fundamentalist Christian beliefs and that the statute thus violates the Establishment Clause. As such, plaintiffs contend that the Act does not meet the requisite standard set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct.

2105, 29 L. Ed. 2d 745 (1971) which provides the salient criteria to determine whether a statute violates the Religion Clauses of the First Amendment. Plaintiffs maintain that the organizations do not have to be churches per se for purposes of violating the Establishment Clause.

Defendants contend that the funds do not go to the Advisory Council but to organizations that provide secular services to assist pregnant woman in placing their children for adoption and giving them counseling. In addition, the State Treasurer (and ultimately through an appropriation bill —the Louisiana legislature) make the final determination as to how much money any organization will receive, not the Council. Defendants also argue that the organizations that comprise the Council are not religious organizations and that they advance certain secular social policies that may be consistent with certain religious beliefs. The mere fact that the organizations' missions statements incorporate religious beliefs does not make them "religious organizations"; the ultimate purpose of the Act is secular. Defendants emphasize that the Council is purely advisory and receives no funds and certainly survives a facial challenge to the statute.

The Supreme Court set out a three part test in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), to determine whether plaintiffs can demonstrate a substantial likelihood of success on the merits of the Establishment claim. Those criteria are:

(1) the statute must have a secular legislative purpose;
(2) its principal or primary effect must be one that neither advances nor inhibits religion; and
(3) the statute must not foster an excessive government entanglement with religion.

Id. at 403 U.S. at 612-13, 91 S. Ct. at 2111. The Court recognizes that it is beyond cavil that a state can " 'make a value judgment favoring childbirth over abortion, and ... implement that judgment by the allocation of public funds.' " *Rust v. Sullivan*, 500 U.S. 173, 192, 111 S. Ct. 1759, 1772, 114 L. Ed. 2d 233 (1991). Apparently, the exercise of this right is at the core of the Louisiana's legislature enacting the instant Act.

With respect to the first criteria, the statute indeed has a secular legislative purpose. That finding is driven by the Supreme Court's application of the *Lemon* factors in *Bowen v. Kendrick*, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988). In that case, the constitutionality of the Adolescent Family Life Act ("AFLA") was at issue. The AFLA provided grants to public or non-private organizations for services and research for pre-marital adolescent sexual relations and pregnancy. The grants were restricted to programs that did not provide abortions, abortion counseling or referral, and specifically included religious organizations among the agencies that would assist in implementing the purposes of the act. The Court held that the AFLA "was motivated primarily by a secular purpose... the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy and parenthood." *Bowen*, 487 U.S. at 602, 108 S. Ct. at 2571.

Similarly, the Act at issue herein has a secular purpose, to promote adoption as a solution for unwanted pregnancies. Certainly, the purpose of these two statutes is sufficiently similar for the Court to rely on *Bowen*'s analysis in this regard.

As to the second criteria, the "primary effect" of the Act at issue herein cannot be said to either advance or enhance religion. Again, the analysis found in *Bowen* provides this Court a touchstone. The Supreme Court characterized the AFLA as follows:

> Simply stated, it authorizes grants to institutions that are capable of providing certain care and prevention services to adolescents. Because of the complexity of the problems that Congress sought to remedy, potential grantees are required to describe how they will involve other organizations, including religious organizations, in the programs funded by the federal grants. ... There is no requirement in the Act that grantees be affiliated with any religious denomination, although the Act clearly does not rule out grants to religious organizations. The services to

> be provided under AFLA are not religious in character... nor has there been any suggestion that religious institutions or organizations with religious ties are uniquely well qualified to carry out those services.

Id. 487 U.S. at 604, 108 S. Ct. at 2572 (emphasis added). Under the facts of this case, there is no proof that any of the three groups would constitute a religious institution for the purpose of this analysis. No factual evidence except the mission statements set out in the memorandum has been presented to prove the proposition that the Council is comprised of religious organizations or that they are even associated with an organized church. Moreover, the services to be provided are not religious in character. Under the Louisiana scheme, no preference is made for sectarian organizations to be awarded grants. On the face of the statute, it is impossible to say that the primary effect would be to promote religion.

Furthermore, in the context of AFLA the Supreme Court recognized that the effect of Congress' recognition that religious organizations can help solve problems is at most 'incidental and remote' in advancing religion and would not defeat the viability of this statute. *Id.* at 487 U.S. at 607, 108 S. Ct. at 2573. Also, in the *Bowen* case, the Court found that indeed the fact that religious organizations were receiving funds through the program did not render the AFLA violative of the Establishment Clause because nothing on the face of the act indicated that a significant proportion of the federal funds were to be disbursed to "pervasively sectarian" institutions. The Court noted:

> Indeed, the contention that there is a substantial risk of such institutions receiving direct aid is undercut by the AFLA's facially neutral grant requirements, the wide spectrum of public and private organizations which are capable of meeting the AFLA's requirements, and the fact that, of the eligible religious institutions, many will not deserve the label of "pervasively sectarian."

Id. at 487 U.S. at 610, 108 S. Ct. at 2575.

This analysis is equally applicable to the Act at issue herein and results in this Court's conclusion that plaintiffs do not have a substantially (sic) likelihood of proving this element of the *Lemon* analysis. The fact that these three organization (sic) are acknowledged as having expertise in the secular mission of the Act would at most have an 'incidental and remote' effect in advancing religion. Likewise, there is no indication that the funds will be disbursed to "pervasively sectarian" institutions.

With respect to whether the Act fosters an excessive government entanglement with religion, again it would appear that plaintiffs do not have a substantial likelihood of proving up this prong. Again, the paucity of evidence with respect to whether the three organizations are "religious" cuts against the plaintiffs at this procedural stage of the proceedings. Considering that AFLA has far more sectarian overtones than the License Plate Act at issue herein, the court is at a loss to find that such "entanglement" is sufficient to find that the Establishment Clause is violated by the Act at issue herein. Furthermore, as noted in *Bowen*, it does not appear that there need be excessive monitoring that would lead to "excessive entanglement" sufficient to render the Act unconstitutional. Grant monitoring alone does not meet the level of entanglement required to violate the Establishment Clause.

B. The First Amendment Freedom of Speech Claim

Plaintiffs also contend that under the First Amendment and the constitutional right to freedom of speech, the Act is unconstitutional because it discriminates based on viewpoint by allowing only the "pro-life viewpoint to be expressed via special license plates and pro-choice car owners are not given the option of expressing their view on their license plates." *See generally Sons of Confederate Veterans v. Glendening*, 954 F. Supp. 1099, 1103 (D. Md. 1997) (refusal to produce and distribute vanity plate for the Sons of Confederate Veterans bearing the organization's name and confederate flag constitute impermissible viewpoint discrimination). Defendants respond that the Constitution does not forbid a State, pursuant to democratic processes, from expressing a preference for normal childbirth. *Casey v. Planned Parenthood of*

SE Penn., 505 U.S. 833, 872, 112 S. Ct. 2791, 2818, 120 L. Ed. 2d 674 (1992). As such, the defendants argue that the cases relied on by plaintiffs are distinguishable, because the State uses the democratic process to select messages that the State itself chooses to make available. Defendants contend then that the license plate is an expression of the State's own speech and does not constitute a forum for First Amendment purposes. Defendants write:

> Louisiana, through its through its [sic] democratic process of legislative enactments, makes a varied number of official statutory messages by the state itself available to those who choose an alternative state message instead of the one on the basic license plate and to pay an additional fee for the same. Without statutory authorization for the plate, it cannot be issued; Louisiana has not made its special design motor vehicle license plates a forum for private speech, slogans, mottos and symbols.

(Defendants' Memorandum in Opposition at 9). This contention is an oxymoron. The state is using public property to "speak" to promote its view and to allow members of the motoring public also to "speak" that same message and then contending it has not created a forum for speech.

Alternatively, defendants argue that even if its special design motor vehicle license plates constitute a forum for private speech, the controversy is not ripe as the plaintiffs have not alleged that they ever attempted to obtain a legislative enactment authorizing the private message they seek to display. *Hildreth v. Dickinson*, Case No. 99-583-CIV-J-21-A (M.D. Fla. December 22, 1999) (unpublished opinion). Defendants also argue that plaintiffs lack standing because there is no statute or ordinance that prohibits plaintiffs' own speech again relying on *Hildreth*.

The Court will now address whether there is a substantial likelihood of success on the merits with respect to the free speech issue. As so eloquently stated in *Lewis v. Wilson*, 89 F. Supp. 2d 1082 (E.D. Mo. 2000):

> The First Amendment guarantees freedom of speech. However, it does not grant carte blanche for all speech under all circumstances. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 799, 105 S. Ct. 3439, 3447, 87 L. Ed. 2d 567 ... (1985). Rather a governmental entity may "preserve the property under its control for the use to which it is lawfully dedicated." *Id.*, 473 U.S. at 800, 105 S. Ct. at 3448.

Id. at 1087. Thus, the inquiry as to whether governmental regulation of putative speech is permissible requires the Court to undertake three discrete steps. First the Court must determine whether the subject of the analysis is speech at all. Second, the Court must determine the nature of the governmentally created forum. Finally, the Court must assess whether the regulation satisfies the requisite standard. *Cornelius*, 473 U.S. at 797, 105 S. Ct. at 3446.

A. Speech

The Supreme Court has examined the issue as to what constitutes "speech" for the purposes of the First Amendment. As stated in *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989):

> In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." 418 U.S. at 410-411, 94 S. Ct. at 2730.

Id., 491 U.S. at 404, 109 S. Ct. at 2539. Indeed, the defendants maintain that they are articulating a viewpoint legislatively chosen and embraced by the State. Obviously then the intent of the defendants is to convey a particularized message of the "State's" choosing to promote a "pro-life" agenda through the motor-vehicle driving public who select a "Choose Life" plate. As such, there is

a substantial likelihood that the Court will find the First Amendment is triggered under the facts of this case. *Lewis*, 89 F. Supp. 2d at 1087.

It must be noted that of the 60-odd acts that establish the various prestige plates available to Louisiana car owners most, if not all, do not concern polemical topics. A random sampling of the title of relevant statutes demonstrates the following prestige plates are available: Special license plates for former prisoners of war, Shriner vehicle plates, special license plates for certain disabled veterans, special Farhad Grotto vehicle license plates, special license plates for Louisiana members and retired members of the reserve forces of the U.S., special college and university license plates, special plates for veterans of the Vietnamese Conflict, the Korean conflict, Purple Heart recipients, veterans of Operation Desert Shield/Desert Storm, Knights of Columbus, the Clergy, World War II veterans, plates to promote child safety, plates for members of the Knights of Peter Claver, plates supporting the Louisiana Black Bear, the Louisiana Quail Unlimited, "Helping Schools", Lions International, Ducks Unlimited, Laos War veterans, Girl Scouts of U.S.A., McKinley High School, "I Support River Region Cancer Center," "Don't Litter Louisiana". Thus, the vast majority of the prestige plates are created and displayed simply to denote that the car owner is member or supporter of a particular organization or cause, and for the most part the organizations represented do not appear to be controversial. The Court now turns to the issue of what type of forum is created by the license plate, if any.

B. Forum

As stated in *Perry Educ. Ass'n v. Perry Local Educators' Assn.*, 460 U.S. 37, 44, 103 S. Ct. 948, 954, 74 L. Ed. 2d 794 (1983), "the existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." The Supreme Court has recognized that there are basically three fora: (1) the "traditional public forum," (2) "the designated public forum," and (3) the "nonpublic forum". *Lewis*, 89 F. Supp.

2d at 1088 citing *Perry*. Examples of traditional public forums are streets and parks that have always been "used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry*, 460 U.S. at 46, 103 S. Ct. at 955. A designated public forum is "a location or channel of communication designated by the government for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Lewis*, 89 F. Supp. 2d at 1087 citing *Perry*, 460 U.S. at 45-46, 103 S. Ct. at 955. Finally, a nonpublic forum is any forum which is not by tradition or designation a forum for public communication. *Id.*

As concerns what constraints on speech can be constitutionally imposed by government in these three settings, the court in *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. at 1102-03 provided a lucid and succinct analysis:

> The government's regulation of speech in both the traditional and limited or designated public fora is subject to strict scrutiny *United States v. Kokinda*, 497 U.S. 720, 726-27, 110 S. Ct. 3115, 3119-20 (1990). Thus, a content-based regulation in either of these fora is presumed unconstitutional and will only be permitted if it is narrowly tailored to serve a compelling government interest. *Perry Education Ass'n*, 460 U.S. at 45, 103 S. Ct. at 954-55. The government may also enforce narrowly tailored and content-neutral time, place, and manner restrictions, if the restrictions serve a significant government interest and leave open ample alternate channels of communication. *Id.* In the nonpublic forum, however, the government's regulation of speech is subject only to a reasonableness test, but with a requirement ... of viewpoint neutrality. *Kokinda*, 497 U.S. at 727, 110 S. Ct. at 3120. Thus, "[c]ontrol over ... a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806, 105 S. Ct. at 3451.

Id. (emphasis added). For purposes of this preliminary injunction, plaintiffs have assumed that the prestige license plates at issue herein constitute a non-public forum, and the Court will analyze the issue as such. *See Lewis*, 89 F. Supp. 2d at 1089 (by process of elimination, court concluded restriction on a vanity plate constituted restriction arising in a nonpublic forum); *Pruitt v. Wilder*, 840 F. Supp. 414, 417 n. 2 (court "assumed" restriction on a vanity plate constituted restriction arising in a nonpublic forum).[5]

C. Scrutiny with Respect to Nonpublic Forum

The issue thus becomes whether there is a substantial likelihood that the Act is unreasonable in light of the purpose served by the forum or whether the Act is not viewpoint neutral. Here, the defendants have made clear by their argument that there is no intent to be viewpoint neutral. As such, the Court finds that there is a substantial likelihood that plaintiffs will be successful in proving that this Act violates the First Amendment.

It is beyond peradventure that the State of Louisiana has a right to take a position promoting certain kinds of social behavior; it does so regularly in its legislative enactments and executive decisions. For instance if the State appropriates funds to promote adoption and discourage abortion that is its function and right as a governmental entity. *Casey v. Planned Parenthood of SE Penn.*, 505 U.S. 833, 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233

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[5] The Court would note that there is a distinction between a "vanity plate" and a "prestige plate" or a "specialty plate." Vanity plates are where a state will customize the arrangement of letter and numbers to create a plate for one individual and it cannot be duplicated. A prestige plate or specialty plate is where a license plate is created to refer to a specific group like the Shriners or a school. The plate at issue is a specialty plate. Furthermore, an argument can be made that a specialty plate may constitute a limited public forum, whereas vanity plates should be considered a nonpublic forum. Jack Achiezer Guggenheim & Jed Silversmith, Confederate License Plates at the Constitutuional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment 54 U. Miami L. Rev. 563, 577 (2000).

(1991). However, once the State creates a forum where viewpoints are expressed, it must be viewpoint neutral. The State has unequivocally taken the stand here that the message "Choose Life" is its own message and that the democratic process, i.e. "the legislative act", will be frustrated if the Act is declared unconstitutional. The State has chosen license plates as a forum for speech. Once it makes this choice it cannot discriminate against another viewpoint.

As stated by District Judge Smalkin of the United States District Court for Maryland:

> Regardless of the type of forum, any governmental regulation of speech must be viewpoint-neutral. That is, the government may not target the particular views taken by speakers on a subject, "in an effort to discourage one viewpoint and advance another." *See Rosenberger v. Rector and Visitors of University Virginia*, 515 U.S. 819, ----, 115 S. Ct. 2510, 2516, 132 L. Ed. 2d 700 ... (1995); ... Nor may the government restrict speech based on "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger*, 515 U.S. at ----, 115 S. Ct. at 2516. When the government denies access to speakers solely to suppress their point of view, "the violation of the First Amendment is all the more blatant." *Id.* The rationale for prohibiting the government from engaging in viewpoint discrimination is that such actions raise " 'the specter that Government may effectively drive certain ideas or viewpoints from the marketplace.' "

Sons of Confederate Veterans, Inc., 954 F. Supp. at 1102-03. The right to an abortion is an extremely controversial issue and is the focus of a national debate. To provide through legislation for only one viewpoint to be expressed on such a polemical topic is very likely an unconstitutional restraint of free speech as it restricts the forum to only one view--that being the view of the State.

The Court recognizes that the line of cases upon which plaintiffs rely *Lewis v. Wilson*, 89 F. Supp. 2d (E.D. Mo. 2000);

Sons of Confederate Veterans v. Glendening, 954 F. Supp. 1099, 1103 (D. Md. 1997); *Pruitt v. Wilder*, 840 F. Supp. 414 (E.D.Va.1994), all arise in the context of the government prohibiting the publication of either a prestige plate for a group (*Sons of Confederate Veterans*) or specific vanity plates denoting either a deity (*Pruitt*) or an allegedly racially charged word — "Aryan-1" (*Lewis*). The Court further understands that the State has not prohibited defendants from publishing their own plate. Nonetheless, the very fact that the defendants insist that this is a state "message" will probably require the Court to find the Act unconstitutional when the actual merits of these claims come to trial.

In *N.A.A.C.P. v. Hunt*, 891 F.2d 1555 (11th Cir.1990) where the court found that flying the confederate flag over the state capitol dome did not violate the free speech clause of the First Amendment, the court noted in dicta:

> As one commentator has noted, "[f]ree speech theory has focused on the government as censor; it has had little to say about the process by which the government adds its voice to the market place." Shriffrin, Government Speech, 27 U.C.L.A. L.Rev. 565, 569-70 (1980). Indeed the First Amendment protects citizens' speech only from government regulation; government speech itself is not protected by the First Amendment. *Columbia Broadcasting System, Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 139 and n. 7, 93 S. Ct. 2080, 2104, and n. 7 (1973) ... (Stewart, J. concurring).
> Restriction on government speech seems to spring from an ideal: "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187, 87 L. Ed. 1628... (1943). There are three ways in which the government's attempts to prescribe orthodoxy have been restricted. First the government may

> not abridge "equality of status in the field of ideas" by granting the use of public forums to those whose views it finds acceptable while denying their use to those with controversial views. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96, 92 S. Ct. 2286, 2290, 33 L. Ed. 2d 212 ... (1972). This concern is especially important when the government's dedication of a forum suppresses controversial or political speech. *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 575 (9th Cir.1984), *cert. denied*, 471 U.S. 1054, 105 S. Ct. 2115, 85 L. Ed. 2d 480... (1985). Second, the government may not monopolize the "marketplace of ideas," thus drowning out private sources of speech. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390, 89 S. Ct. 1794, 1806, 23 L. Ed. 2d 371... (1969). For example the government may not confer radio frequency monopolies on broadcasters it prefers. *Id.* Finally the government may not "compel persons to support candidates, parties ideologies or causes they are against." *Lathrop v. Donohue*, 367 U.S. 820, 873, 81 S. Ct. 1826, 1853, 6 L. Ed. 2d 1191, ... (1961) (Black, J. dissenting). For instance, state citizens may not be compelled to use car license plates carrying messages with which they disagree. *Wooley v. Maynard*, 430 U.S. 705, 717, 97 S. Ct. 1428, 1436, 51 L. Ed. 2d 752 (1977).

Hunt, 891 F.2d at 1565-66. The Court finds this analysis compelling and instructive. See *Coleman v. Miller*, 117 F.3d 527, 530 n. 7.[6]

The defendants argue that because there are so many different types of plates available--upwards of 60--as well as the normal State plate, the State is not compelling the plaintiffs to use a "Choose Life" plate; thus, the Act is not in contravention of the constraints of the First Amendment. This argument fails to

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[6] In *Coleman and Miller*, the State had not acted so as to designate state buildings from which controversial flags flew as public property as a forum for pubic communication. *Hunt*, 891 F.2d at 1566.

recognize that the State has taken the position that this message is its own. As such, it appears at this juncture that the State fails in its responsibility to provide a viewpoint-neutral forum, and the Act will probably be found to be an unconstitutional violation of the First Amendment right to free speech. The plain fact is that plaintiffs are not legislatively authorized to use the forum (i.e. a license plate) to express their view(s), and that forum exists for only one point of view as adamantly declared by the State--its own.

D. Defenses Raised by the Defendants--Ripeness and Standing

Defendants argue that because plaintiffs have not alleged that they have actually gone through the process of obtaining a prestige plate--that is getting 100 signatures on a petition, trying to persuade a state legislator to introduce a bill in the legislature that would establish a pro-choice prestige plate, and then attempting to have such a bill enacted into law--the suit is "premature" and the plaintiffs lack standing. They rely primarily on the analysis found in the *Hildreth* case previously mentioned; however, *Hildreth* can be factually distinguished. In addition, the Court respectfully disagrees with the court's analysis of the issue.

In *Hildreth*, a statute substantially similar to the "Choose Life" plate statute at issue herein was passed by the Florida state legislature and challenged by certain Florida residents as being unconstitutional. Unlike the procedures required in Louisiana, the Florida scheme was much more onerous. The following requirements had to be met prior to the Florida legislature considering authorizing a specialty license plate. Those requirements included: (1) a written request with a general description of the license plate; (2) the results of a scientific sample survey of Florida motor vehicle owners that indicates at least 15,000 motor vehicle owners intend to purchase the proposed plate at the increased cost; (3) an application fee not to exceed $30,000 to defray the Department's costs of developing the new plate; and (4) a marketing strategy outlining short-term and long-term marketing plans; and (5) a financial analysis outlining the anticipated revenues and the planned expenditures of the revenues.

That information had to be submitted to the Department 90 days prior to the convening of the next regular legislative session. If approved by the Florida legislature, the Department would then develop the plate for production.

The *Hildreth* court found that because plaintiffs had not completed any of the above requirements, their claim was not ripe. The court found that the plaintiffs' failure to request the development of a pro-choice license plate pursuant to the applicable statutory mechanism made their claim unripe for judicial determination. The court relied on the following analysis provided by the United States Court of Appeals for the Eleventh Circuit:

> Because both standing and ripeness analyses look to the existence of actual injury to the plaintiff caused by the alleged wrong, they overlap to some degree and often collapse into each other. Standing may be distinguished from ripeness, however, because where standing is at issue the question regarding the existence of an actual injury arises from the identity of the parties rather than--as here the non-occurrence of events in the causal chain which may or may not occur.

Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756, 760 n. 3 (11th Cir.1991). The *Hildreth* court then stated:

> Plaintiffs argue that even if they meet the statutory requirements, there is still no guarantee that the legislature will approve their plate. Thus requiring them to comply with the statute would be fruitless. This argument suggests that the Court entertain a conjectural or hypothetical injury. The Court will not do so. Plaintiffs' suggestion that the current political climate does not augur well for the passage of a pro choice license plate law is legally speculative. Since the inability to acquire their desired specialty plate is purely conjectural, so too is any alleged resultant injury.

Hildreth at p. 10. The *Hildreth* court also found that plaintiffs lacked standing because the statute at issue therein did not limit or regulate speech in any way. The court saw the act as an opportunity for speech but not a regulation thereof. The *Hildreth* court ignored that:

> "[w]hen the First Amendment is in play, however, the Court has relaxed the prudential limitations on standing to ameliorate the risk of washing away free speech protections." See *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956, 104 S. Ct. 2839, 2846-47, 81 L. Ed. 2d 786 (1984). Hence when freedom of expression is at stake: Litigants... are permitted to challenge a [policy] not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the policy's very existence may cause others not before the court to refrain from constitutionally protected speech or expression. *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 2916, 37 L. Ed. 2d 830 (1973). *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir.1997).

The *Hildreth* court focused on the process rather than the result. As noted, where as here, a forum is involved--viewpoint neutrality is required. By the very act of injecting "the State's position which has been legislatively sanctioned" into a forum, First Amendment injury occurs. In the *Board of Regents of Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 1356-57, 146 L. Ed. 2d 193 (2000), the Supreme Court noted that the "whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent." Furthermore, the Supreme Court has stated:

> ... when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first

> applying for, and being denied, a license. [footnote omitted]. E.g. *Freedman v. Maryland*, 380 U.S. 51, 56, 85 S. Ct. 734, 737, 13 L. Ed. 2d 649 (1965) ("In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license"); ... See also *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151, 89 S. Ct. 935, 939, 22 L. Ed. 2d 162 (1969) (" 'The Constitution can hardly be thought to deny to one subjected to the restraints of [a licensing law] the right to attack its constitutionality, because he has not yielded to its demands...' ")

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755- 56, 108 S. Ct. 2138, 2143(1988).

Once a forum has been created which allows viewpoint discrimination, it is unconstitutional from the moment the discriminatory forum is created. Thus, the controversy appears to be ripe for adjudication. Those who want to express another point of view should not have to wait a year for the legislature to open the license plate forum particularly in light of the State's pointed espousal of the published opinion to "Choose Life." Once free speech has been abridged in such a manner, there is no case law supporting the proposition that those individuals whose speech has been restrained in this particular forum must wait, a week, a month, or a year to have an opportunity to express an opposing viewpoint in that forum. Thus, it is unlikely that the Court will recognize the defenses raised by defendants.

II. Irreparable Harm By Denial of Relief

The next inquiry with respect to the issuance of a preliminary injunction is whether there is a substantial threat that plaintiff will suffer irreparable injury if the injunction is denied. *Sugar Busters LLC*, 177 F.3d at 265. As a matter of law, federal courts at all levels have recognized repeatedly that constitutional rights

violations constitute irreparable harm. *Maxey v. Smith*, 823 F. Supp. 1321, 1328 (N.D. Miss. 1993) citing *Elrod v. Burns*, 427 U.S. 347, 373-74, 96 S. Ct. 2673, 2689-90, 49 L. Ed. 2d 547 (1976); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). "The loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." *Maxey*, 823 F. Supp. at 1328. Thus, if a preliminary injunction were not to issue, plaintiffs would most assuredly suffer irreparable harm--the curtailment of the constitutionally protected right to free speech. Therefore, the Court finds that this criteria has been satisfied.

III. Injury Outweighs Damage Injunction Might Cause Defendants

The next inquiry is whether the threatened injury to plaintiffs outweighs the damage an injunction might cause the defendants. *Sugar Busters LLC*, 177 F.3d at 265 (5th Cir. 1999). The Court finds that plaintiffs have met this burden as well. The Court is convinced that the threatened constraint on constitutionally protected free speech by the defendants far outweighs the damage that would be imposed by not allowing the publication of the license plates and the dissemination of funds so collected. Defendants themselves have opined that it will be over a year before any monetary benefits that are anticipated under this law would actually be forthcoming.

IV. Injunction Will Not Disserve the Public Interest

Finally, the last factor is whether the injunction will not disserve the public interest. *Sugar Busters LLC*, 177 F.3d at 265 (5th Cir. 1999). "Curtailing constitutionally protected speech will not advance the public interest, and 'neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.' " *American Civil Liberties Union v. Reno*, 217 F.3d 162 (3rd Cir.2000) citing *ACLU v. Reno*, 929 F. Supp. 824, 866 (E.D. Pa. 1996).

CONCLUSION

Considering the foregoing, the Court finds that all of the factors necessary for a preliminary injunction to issue have been met by plaintiffs. Thus, plaintiffs have demonstrated their entitlement to the equitable relief sought by this motion. Accordingly,

IT IS ORDERED that the Motion for Preliminary Injunction is GRANTED, and defendants Richard L. Stalder, Secretary, Department of Public Safety and Corrections for the State of Louisiana and John Kennedy, Treasurer for the State of Louisiana are ENJOINED from enforcing or implementing Louisiana House Bill No. 2082, codified at La. Rev. Stat. § 47:463.61 (1999) and are specifically directed to halt production of the "Choose Life" special prestige license plates.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA.

RUSSELL J. HENDERSON;
DOREEN KEELER; ROBERT H. LOEWY
and GREATER NEW ORLEANS
SECTION OF THE NATIONAL COUNCIL
OF JEWISH WOMEN,
Plaintiffs,

v.

RICHARD J. STALDER, SECRETARY,
DEPARTMENT OF PUBLIC SAFETY AND
CORRECTIONS; JOHN KENNEDY,
STATE TREASURER,
Defendants.

No. CIV. A. 00-2237.

Dec. 22, 2000.

DUVAL, J.

1.

Before the Court is Defendants' Motion, Pursuant to F.R.C.P. Rule 62, For STAY of PRELIMINARY INJUNCTION (Doc. 16) which was set for November 11, 2000. Richard L. Stalder, Secretary of the Louisiana State Department of Public Safety and Corrections, and John Kennedy, Treasurer of the State of Louisiana have moved the Court to stay the effect of the order entered on August 29, 2000 granting a preliminary injunction in this matter and to suspend said preliminary injunction during the pendency of defendants' appeal therefrom. Having reviewed the pleadings, memoranda and the relevant law, the Court finds no merit in this motion.

In order to obtain a stay of an injunction pending appeal under Fed. R. Civ P. 62, the moving party must show: (1) a

likelihood of prevailing on the merits on appeal; (2) that it will suffer irreparable injury from the denial of the stay; (3) that other parties will not be substantially harmed; and (4) that granting the stay will serve the public interest. *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992). Additionally "the stay of an equitable order is an extraordinary device which should be granted sparingly." *United States v. State of Louisiana*, 815 F. Supp. 947, 948 (E.D. La. 1993) (quoting *United States v. Texas*, 523 F. Supp. 703, 723 (E.D. Tex. 1981).

Obviously this Court is not of the opinion that the defendants are likely to prevail on the merits. Defendants have failed to prevail on the merits for the reasons set forth in the Court's 22-page opinion on August 29, 2000. This Court found that the statute clearly violated the First Amendment and abridged the right of free speech as the statute is not viewpoint neutral.

The defendants' principle argument is that because the message on the license plate is the message of the State, the message is protected under the First Amendment. Again, for the reasons given in the original opinion, this argument is without merit. Additionally, the defendants mis-characterize this Court's opinion. Although clearly the State has embraced the "Choose Life" plate as its message, the speech at issue is that of private citizens expressing it through a forum for private speech created by the State which is undoubtedly not viewpoint neutral. In this case, the State is not "speaking" but it has created a forum for speech and is acting as a censor of speech by deciding which messages appear on license plates.

Additionally, the case was certainly ripe, again, as stated in the original opinion and which is punctuated by the State's strident proclamation that this message is the State's policy. Certainly it would then be futile for the plaintiffs to have to wait a year to convince an adamant State to change its position.

The Court is not convinced that the defendants will suffer irreparable injury or that other parties will not be substantially harmed if the stay is granted. It may be over a year before any

monetary benefits would reach any organizations and certainly revenues could be raised through other programs that are not unconstitutional. The Court in essence found substantial harm when it granted the injunction and found a violation of plaintiffs' free speech rights.

Moreover the granting of this stay would not serve the public interest. In fact, it would be a disservice to the public interest to grant the stay as that action would be tantamount to perpetuating a Constitutional violation. Accordingly,

IT IS ORDERED that Defendants' Motion, Pursuant to F.R.C.P. Rule 62, For Stay of Preliminary Injunction is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-31171

RUSSELL J HENDERSON; ET AL

Plaintiffs

RUSSELL J. HENDERSON; DOREEN KELLER; ROBERT H LOEWY; GREATER NEW ORLEANS SECTION OF THE NATIONAL COUNCIL OF JEWISH WOMEN

Plaintiffs-Appellees

v.

RICHARD L STALDER, Secretary, Department of Public Safety and Corrections; JOHN KENNEDY, State Treasurer

Defendants-Appellants

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC
(Opinion 3/29/02, 5 Cir., _____, _____ F.3d _____)

Before DAVIS and JONES, Circuit Judges, and BARBOUR, District Judge.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
Edith H. Jones
United States Circuit Judge

Louisiana Revised Statute 47 § 463.61

Special prestige license plates; "CHOOSE LIFE" advisory council; fund

Current through all 2001 Regular and Second Extraordinary Session Acts

A.

The secretary of the Department of Public Safety and Corrections shall establish a special prestige license plate to be known as the "CHOOSE LIFE"[1] plate, provided there are a minimum of one hundred applicants for such plate. The license plate shall be restricted to passenger cars, pickup trucks, vans, and recreational vehicles. The license plate shall be of a color and design selected by the Choose Life Advisory Council provided it is in compliance with R.S. 47:463(A)(3), and shall bear the legend "Choose Life"[1].

B.

The prestige license plate shall be issued, upon application, to any citizen of Louisiana in the same manner as any other motor vehicle license plate.

C.

The annual fee for this special prestige license plate shall be twenty-five dollars, in addition to the regular motor vehicle license fee provided in R.S. 47:463, to be distributed in the manner set forth in Subsection F of this Section and a three dollar and fifty cent handling fee to be retained by the department to offset a portion of administrative costs.

D.

The department shall collect the fee for the prestige license plate and forward the fee to the state treasurer for immediate

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[1] Throughout this section, the slogan "CHOOSE LIFE" or "Choose Life" is as it appears in the enrolled bill (Acts 1999, No. 729, § 1).

deposit in the state treasury.

E.

(1) A Choose Life Advisory Council, hereinafter referred to as the "Council", shall be established to design and review grant applications for qualifying organizations, and shall make recommendations regarding the awarding of grants to the state treasurer. Members of the Council shall serve one-year terms, on a voluntary basis, commencing on October 1, 1999, and shall receive no compensation or reimbursement of any type. Council members are hereby authorized to serve successive terms. The Council shall meet at least once annually, and shall be comprised of the following members:

(a) The president, or his designee, from the American Family Association.

(b) The president, or his designee, from the Louisiana Family Forum.

(c) The president, or his designee, from the Concerned Women for America organization.

(2) At the discretion of the Council, membership may be extended to add members representing the following:

(a) Physicians specializing in obstetrics.

(b) Physicians specializing in pediatrics.

(c) Women who have surrendered children for adoption.

(d) Couples who have adopted children.

(e) Adoption advocacy groups.

(f) Board-certified social workers.

(g) Certified counselors.

F.

(1) After compliance with the requirements of Article VII, Section 9(B) of the Constitution of Louisiana relative to the Bond Security and Redemption Fund, an amount equal to the monies received by the state treasury pursuant to provisions of Subsection D of this Section shall be deposited into the Choose Life Fund, which is hereby created as a special fund in the state treasury and hereafter referred to as the "fund". All unexpended and unencumbered monies in the fund at the end of the fiscal year shall remain in the fund. Monies in the fund shall be invested by the state treasurer in the same manner as monies in the state general fund and interest earned on the investment of such monies shall be deposited into the fund. Monies in the fund shall only be withdrawn pursuant to an appropriation by the legislature solely for the purposes provided by this Section.

(2) An organization wishing to qualify for receipt of funds shall submit an affidavit affirming its qualifications, which shall include a pledge to spend the money in accordance with the provisions of this Section, to the Council and shall qualify as tax exempt under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended. Furthermore, an organization wishing to qualify for receipt of funds shall demonstrate it provides counseling and other services intended to meet the needs of expectant mothers considering adoption for their unborn child. No monies deposited into the fund shall be distributed to any organization involved in, or associated with counseling for, or referrals to, abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising.

(3) Organizations receiving monies under this Section shall use at least fifty percent of such funds to provide for the material needs of expectant mothers considering adoption for their unborn child, including clothing, housing, medical care, food, utilities, and transportation. Such monies may also be used to meet the needs of infants awaiting placement with adoptive parents. The remaining funds may be used for counseling, training, and providing pregnancy testing, but shall not be used for administrative, legal, or capital expenditures.

G.

The state treasurer, based on the recommendations of the Council, shall annually disburse from the fund an equal amount to each of the qualifying organizations, and shall make available, upon request, the name and the amount of monies disbursed to each organization. An organization receiving monies from the fund may be required to submit an annual audit prepared by a certified public accountant, at the discretion of the state treasurer and the Council. The state treasurer and the Council shall review the distribution and expenditure of funds under this Section at least once every three years to ensure funds are disbursed and expended in accordance with the provisions of this Section.

H.

The secretary may establish rules and regulations to implement the provisions of this Section, including but not limited to rules and regulations governing the collection and disbursement of fees, the transfer and disposition of such license plates, the colors available, and the design criteria.

OFFICIAL JOURNAL

OF THE

HOUSE OF

REPRESENTATIVES

OF THE

STATE OF LOUISIANA

FORTY-NINTH DAY'S PROCEEDINGS

Twenty-seventh Regular Session of the Legislature
Under the Adoption of the
Constitution of 1974

House of Representatives
State Capitol
Baton Rouge, Louisiana

Sunday, June 17, 2001

The House of Representatives was called to order at 5:00 P.M., by the Honorable Charlie DeWitt, Speaker of the House of Representatives.

* * * *

HOUSE BILL NO. 52—
BY REPRESENTATIVES BOWLER AND SCALISE
AN ACT

To amend and reenact R.S. 47:463.61, relative to motor vehicles; to provide relative to the "Choose Life" prestige license plate; to provide for the design and color of such plate; to provide relative to the fee for such plate; to provide relative to the use of such fees; to repeal provisions relative to the Choose Life Advisory Council; to repeal provisions relative to the membership, terms, duties, and pay for members of such council; to repeal requirement that qualified organizations submit annual audits; to prohibit qualified organizations from

disclosing certain information; and to provide for related matters.

Read by title.

The above bill was taken up with the amendments proposed by the Senate.

SENATE FLOOR AMENDMENTS

Amendments proposed by Senator Bajoie to Reengrossed House Bill No. 52 by Representative Bowler

AMENDMENT NO. 1
On page 1, line 2, after "463.61" insert "and to enact R.S. 47:463.83"

AMENDMENT NO. 2
On page 1, line 3, after "relative to" delete "the "Choose Life" "and insert "certain"

AMENDMENT NO. 3
On page 1, line 3, after "plate;" insert "to provide for the "Choose Life" prestige license plate; to provide for the "Choose Choice" prestige license plate;"

AMENDMENT NO. 4
On page 1, line 12, after "reenacted" insert "and R.S. 47:463.83 is hereby enacted"

AMENDMENT NO. 5
On page 5, between lines 22 and 23, insert the following:

" * * *

§463.83. Special prestige license plates; Choose Choice; fund

A. The secretary of the Department of Public Safety and Corrections shall establish a special prestige license plate to be known as the Choose Choice plate, provided there are a minimum of one hundred applicants for such plate. The license plate shall be

restricted to passenger cars, pickup trucks, vans, and recreational vehicles. The design of such plate shall include a logo depicting a woman holding an American flag and a Louisiana flag and shall bear the words "Choose Choice", and shall comply with R.S. 47:463(A)(3).

B. The prestige license plate shall be issued, upon application, to any citizen of Louisiana in the same manner as any other motor vehicle license plate.

C. The annual fee for this special prestige license plate shall be twenty-five dollars, in addition to the regular motor vehicle license fee provided in R.S. 47:463, to be distributed in the manner set forth in Subsection E of this Section, and a three dollar and fifty cent handling fee to be retained by the department to offset a portion of administrative costs.

D. The department shall collect the fee for the prestige license plate and forward the fee to the state treasurer for immediate deposit in the state treasury.

E.(1) After compliance with the requirements of Article VII, Section 9(B) of the Constitution of Louisiana relative to the Bond Security and Redemption Fund, an amount equal to the monies received by the state treasury pursuant to provisions of Subsection D of this Section shall be deposited into the Choose Choice Fund, which is hereby created as a special fund in the state treasury and hereafter referred to as the "fund". All unexpended and unencumbered monies in the fund at the end of the fiscal year shall remain in the fund. Monies in the fund shall be invested by the state treasurer in the same manner as monies in the state general fund, and interest earned on the investment of such monies shall be deposited into the fund. Monies in the fund shall be withdrawn only pursuant to an appropriation by the legislature solely for the purposes provided by this Section.

(2) An organization wishing to qualify for receipt of funds shall submit an affidavit affirming its qualifications, which shall include a pledge to spend the money in accordance with the provisions of this Section, to the treasurer and shall qualify as tax exempt under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended. Furthermore, an organization wishing to qualify for receipt of funds shall demonstrate it provides counseling and other services intended to meet the needs of pregnant women.

(3) Organizations receiving monies under this Section shall use such funds to provide for the material needs of pregnant women, including but not limited to providing clothing, housing, medical care, food, utilities, and transportation. The remaining funds may be used for family planning counseling, job training, and other related matters.

F. The state treasurer shall annually disburse from the fund an equal amount to each of the qualifying organizations and shall make available, upon request, the name and the amount of monies disbursed to each organization. However, no organization receiving funds according to the provisions of this Section shall be required to disclose the name of any individual receiving money from such organization. The state treasurer shall review the distribution and expenditure of funds under this Section at least once every three years to ensure funds are disbursed and expended in accordance with the provisions of this Section.

G. The secretary may establish rules and regulations to implement the provisions of this Section, including but not limited to rules and regulations governing the collection and disbursement of fees, the transfer and disposition of such license plates, the colors available, and the design criteria."

SENATE FLOOR AMENDMENTS

Amendments proposed by Senator Fontenot to Reengrossed House Bill No. 52 by Representative Bowler

AMENDMENT NO. 1

In Senate Floor Amendment No. 5 proposed by Senator Bajoie and adopted by the Senate on June 15, 2001 page 1, line 19 and 20, change "one hundred" to "one thousand"

AMENDMENT NO. 2

On page 2, line 2, change "one hundred" to "one thousand"

Rep. Bowler moved that the amendments proposed by the Senate be rejected.

ROLL CALL

The roll was called with the following result:

YEAS

Alario	Futrell	Odinet
Alexander, E	Gallot	Perkins
Alexander, R	Guillory	Pierre
Ansardi	Hammett	Pitre
Baldone	Heaton	Powell
Baylor	Hebert	Riddle
Bowler	Hill	Romero
Broome	Holden	Salter
Bruce	Hopkins	Scalise
Bruneau	Hudson	Schneider
Carter, R	Hutter	Shaw
Cazayoux	Jackson, M	Smith, G.—56th
Clarkson	Johns	Smith, J.D.—50th
Crane	Katz	Smith, J.H.—8th
Crowe	Kennard	Smith, J.R.—30th
Curtis	Kenney	Sneed
Damico	LaFleur	Stelly
Dartez	Lancaster	Thompson
Devillier	Landrieu	Toomy
Diez	LeBlanc	Townsend
Donelon	Lucas	Triche

Downer	Martiny	Tucker
Durand	McCallum	Waddell
Erdey	McDonald	Walsworth
Farrar	McMains	Welch
Faucheux	McVea	Winston
Flavin	Montgomery	Wooton
Frith	Morrish	Wright
Fruge	Nevers	

Total—86

NAYS

Carter, K	Morrell	Schwegmann
Daniel	Murray	Swilling
Hunter	Pratt	
Jackson, L	Richmond	

Total—10

ABSENT

Mr. Speaker	Glover	Pinac
Baudoin	Green	Quezaire
Doerge	Iles	Strain

Total—9

The amendments proposed by the Senate were rejected.

Conference Committee appointment pending.

No. 02-523

Supreme Court U.S.
FILED
NOV 1 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RUSSELL J. HENDERSON, DOREEN KEELER, ROBERT H. LOEWY, and GREATER NEW ORLEANS SECTION OF THE NATIONAL COUNCIL FOR JEWISH WOMEN,

Petitioners,

v.

RICHARD L. STALDER, Secretary, Department of Public Safety and Corrections, and JOHN KENNEDY, State Treasurer,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Defendants, Richard L. Stalder, in his official capacity as Secretary of the Louisiana Department of Public Safety and Corrections, and John Kennedy, in his official capacity as Treasurer of the State of Louisiana, oppose the granting of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit at the request of plaintiffs for a number of reasons which are set forth below.

STATEMENT OF THE CASE

The petitioners' "Statement of the Case" in their petition contains numerous erroneous legal conclusions and a completely erroneous interpretation of the statute in violation of the Supreme Court of Louisiana's rules for interpreting Louisiana state statutes.

Instead of reciting what the petitioners sought by this litigation in terms of legal conclusions, as have petitioners in this case, defendants have reproduced in the Appendix hereto[1] the petitioners' Second Amended Complaint, their final pleading controlling their case. *See* Opp. App., pp. 1-9. This Second Amended Complaint speaks for itself. It was in the appellate record that went before the U.S. Court of Appeals for the Fifth Circuit, and was, therefore, before that court for review on appeal of this case, even though it was filed after the notice of appeal.

[1] The Appendix to this opposition brief will hereinafter be abbreviated "Opp. App." and the Appendix to the writ petition will hereinafter be abbreviated "Pet. App."

It is interesting to note that nowhere in this Second Amended Complaint is it alleged that the State of Louisiana did anything to create any kind of *forum* for private speech. Because the words of the Legislature in a statutory law that it enacts are obviously state governmental speech, the Second Amended Complaint appears to imply that the law is to the effect that *fora* analysis applies to governmental speech – that is, once the state itself uses its own property for publication of governmental speech on a polemical issue, then it must automatically allow private speech makers the opportunity to publish their views by using that same property.

At the hearing on the preliminary injunction, the district court seemed to so read the case. It found that the "Choose Life" message enacted by the Louisiana Legislature was indeed state speech, but apparently because it was speech on a polemical subject, the district court applied *fora* analysis to the situation anyway and said that the state had engaged in viewpoint discrimination by its own speech and in not producing for some of the petitioners new license plates on which to express their differing viewpoints. As a result, the district court enjoined the state speech and the publication of the state's authorized motor vehicle license plates.

Over defendants' arguments against federal jurisdiction, petitioners failed to introduce sufficient evidence at the hearing to show that there was federal jurisdiction in this case or that there is any likelihood of an Establishment Clause violation. The district court only granted the preliminary injunction apparently because it thought that *fora* analysis applied to state governmental speech, despite petitioners' contention that the "Choose Life" message mandated by the legislatively enacted statute was

merely private speech. If, indeed, the "Choose Life" message is actually state governmental speech, not only does *fora* analysis not apply (meaning that the complaint fails to state a claim for which relief can be granted), but also there can be no substantial federal question raised by the Second Amended Complaint. In this case, then, there is no federal court jurisdiction because there is no authentic federal question.

Believing that the gravamen of the errors of the district court in granting the preliminary injunction to be the application of *fora* analysis to state governmental speech and then, as a result, the enjoining of the speech (be it governmental or private) with a prior restraint, the defendants took an immediate appeal to the U.S. Court of Appeals for the Fifth Circuit.

The Court of Appeals sagaciously ruled that there was lack of federal jurisdiction in this case. Having before it in the appellate record a transcript of the hearing on the preliminary injunction, the district court's orders and rulings, and the Second Amended Complaint, it ruled essentially that the petitioners did not show sufficient standing to complain about the Establishment Clause claim as taxpayers and that the claim of free speech violation as alleged by them was not able to be redressed under applicable federal law (defendants understand this ruling to mean in practice that there was no federal question jurisdiction).

ARGUMENT: REASONS FOR DENYING THE WRIT

Petitioners Erroneously Interpret The State Statute.

Act 729 of the 1999 Regular Session of the Louisiana Legislature enacted into law La. R.S. 47:463.57, which was redesignated by the Louisiana Law Institute as La. R.S. 47:463.61 without any change in its internal substance. Thus, La. R.S. 47:463.61 provides for the "Choose Life" special prestige license plate and its ultimate statutory purposes.

The petitioners fail to present to this Honorable Court the proper interpretation of the statute in accordance with the rules for interpreting state statutes by the state's highest court. Properly interpreted, the statute does not violate any provision of the First Amendment or any part of the U.S. Constitution.

Louisiana is a mixed jurisdiction having a substantial French and Spanish civilian heritage, unlike the other states with an English common law heritage. Of course, under the general rules of any statutory construction, courts begin their review with the premise that legislation is the solemn expression of legislative will; therefore, the interpretation of the law involves, primarily, the search for the legislature's intent. In civilian heritage and in Louisiana, the legislative will *is* the law, not case law, which is merely interpretative. La. Civil Code art. 2. *See* also generally *Falgout v. Dealers Truck Equipment Co.,* 748 So.2d 399 (La. 1999). When the act is reasonably capable of having more than one meaning and is constitutionally valid with one meaning and not valid with another, the constitutionally valid meaning will be adopted to save the statute, if possible, because the Legislature is presumed to

have intended to enact a constitutionally valid law. *State v. Manuel*, 426 So.2d 140 (La. 1983) and *Pearce ex rel. Structural Pest Control Com. v. Sharbino*, 254 La. 143, 223 So.2d 126 (1969).

Peculiarities in civilian jurisdictions occur when it comes to interpreting statutes with relation to other state statutes and state constitutional provisions. They must interact in the same manner as though the Legislature enacted one harmonious civil code, if possible.

> "[I]n interpreting a part or section of an act, in dispute, the part or section should be interpreted in connection with the rest of the act, and in connection with all laws on the same subject-matter. Moreover, the object that the Legislature had in view should be ascertained, and the interpretation adopted which best harmonizes with the context and with that object."

Thibaut v. Bd. of Comm. of Lafourche Basin Levee Dist., 96 So. 47, 48 (La. 1923). "Laws are presumed to be passed with deliberation and with full knowledge of all existing ones on the same subject. *City of New Orleans v. Board of Sup'rs.*, 216 La. 116, 43 So.2d 237 (1949)," *Theriot v. Midland Risk Ins. Co.*, 694 So.2d 184, 186 (La. 1997). All applicable laws on the same subject matter should be construed together so as to produce a harmonious system, if possible. *Id.* In *In The Interest Of The Minor Child, J.M.*, 590 So.2d 565 (La. 1991), the Supreme Court of Louisiana actually read constitutional requirements of notice and opportunity to be heard into statutes that did not explicitly contain them, in order to produce that one harmonious system.

Regarding the context of state fiscal operations into which R.S. 47:463.61 must operate, La. Const. (1974) art.

3, §16(A) states, "Except as otherwise provided by this constitution, *no money shall be withdrawn from the state treasury except through specific appropriation*, and no appropriation shall be made under the heading of *contingencies* or for longer than one year." (Emphasis added.) Opp. App., p. 10. La. Const. (1974) art. 3, §16(C) reads, "The general appropriation bill shall be *itemized* and shall contain only appropriations for the ordinary operating expenses of government, *public charities*, pensions, and the public debt or interest thereon." (Emphasis added.) Opp. App., p. 10. And La. Const. (1974) art. 3, §16(D) mandates, "All other bills for appropriating money shall be for a *specific purpose and amount*." (Emphasis added.) Opp. App., p. 10.

Thus, despite the wording of the mere face of the statute at issue here, it must be understood that there is no person or body that decides what organizations get what amount of "Choose Life" Fund monies other than the Louisiana Legislature. The state treasurer is a ministerial officer who will implement the Legislature's choices in the matter. And the terms of the statute do not absolutely bind the Legislature in this process, but in a directorial manner, by these words the Legislature reminds itself of its duty to adhere to the purposes of the statute when doing so. As the Supreme Court of Louisiana has explained,

> "The Legislature has absolute control over the finances of the State except as limited by constitutional provisions. *Wall v. Close*, 203 La. 345, 14 So.2d 19; Art. III, Sec. 22, La.Const. of 1921, *supra*. 'That the appropriating of the State's funds is a legislative function is fundamental. It is so recognized in the jurisprudence of all of the States and by all of the law writers on the subject.' *Carso v. Board of Liquidation of State Debt*, 205 La. 368, 17 So.2d 358, 363."

Woodard v. Reily, 244 La. 337, 152 So.2d 41, 56 (La. 1963). *See* also *Louisiana Public Facilities Authority v. Foster*, 795 So.2d 288, 301 (La. 2001). Thus, the state treasurer and advisory council do *not* determine what organizations receive what amounts of "Choose Life" Fund monies; the Louisiana Legislature does in the appropriations process.

Consequently, the essence of this statute, which must be read *in pari materia* with other statutes designating the powers and duties of state governmental branches, departments, officers, and employees in order to result in one harmonious system, is that the secretary of the Department of Public Safety and Corrections provides for the special prestige motor vehicle license plate established by this statute containing the legislatively mandated "Choose Life" message, and although the "Choose Life" Advisory Council may draw up an initial design to go with the statutorily designated "Choose Life" message, the secretary also makes the final determination whether to accept the recommended design or use another that is in compliance with the law generally governing motor vehicle license plate design.[2] In this manner, the State of Louisiana engages in its own speech of providing the State's own message encouraging the choice of life over death and abortion, in accordance with the State's own legitimate interest in the life of an unborn child from the outset of pregnancy to birth. However, so as not to require everyone with a registered motor vehicle to display this particular

[2] *See* La. R.S. 47:505, particularly subsections A and E thereof. Opp. App., p. 11-12.

"Choose Life" license plate,[3] the license plate with this message is offered as an alternative plate to the basic plate for persons who wish voluntarily to pay an additional fee and display this State message.

The statute also provides for the State to obtain revenue from the issuance of these "Choose Life" license plates for the purpose of using its own resources to encourage pregnant women to choose life and adoption over abortion by financing crisis-pregnancy assistance in such forms as crisis-pregnancy counseling, obstetric and pediatric medical and health care, pregnancy care, new-born care and assistance, and adoption services, if finally desired by the pregnant woman.

The funds, once collected from the sale of the plates, are to be appropriated by the state legislature directly from the state treasury to organizations which actually provide such "material" – *i.e.*, "secular" – services; these service-providers must be organizations which have qualified for federal income tax exemption pursuant to Section 501(c)(3) of the Internal Revenue Code[4] and must, therefore, be eleemosynary in nature and act as a "charitable trust," *Bob Jones University v. U.S.*, 461 U.S. 574, 591, 585-592 (1983), to provide these material services ultimately for the public benefit. No one but the Louisiana Legislature, in its act appropriating the funds for expenditure from the state treasury, makes the final determination as to which, if any, of these service-providing organizations will receive what amounts of funds for the

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[3] *Cf. Wooley v. Maynard*, 430 U.S. 705 (1977).

[4] La. R.S. 47:463.61(F)(2). Pet. App., p. A-58.

specific purposes quoted above as explicitly spelled out in the statute. La. R.S. 47:463.61(G) provides authorization to require annual audits to ensure that these funds are being properly spent for these (secular) purposes. Pet. App., p. A-59.

The provision disallowing monies to go to organizations which engage in abortion referrals and abortion counseling is meant to restrict these funds from subverting the very purposes for which they exist and are appropriated by the Louisiana Legislature. They may not be spent to support – directly or indirectly – abortions, abortion referrals, or abortion counseling but rather to support alternatives to abortion encouraging childbirth and life. *See Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519 (1977); and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). With these provisions, Louisiana

> "is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. * * * Thus, a charitable organization could create . . . an affiliate to conduct its [non-abortion] activities using [these funds], and at the same time establish . . . a *separate affiliate* to pursue its [abortion] efforts without [these funds]."

Rust v. Sullivan, 500 U.S. 173, 196-198 (1991) (emphasis added).

Petitioners' Question Number 1

The petitioners' question number one does not present a conflict among the circuits because the Second Amended Complaint (Opp. App., pp. 1-9) was in the appellate record

and before the Court of Appeals when ruling on the question of federal jurisdiction, and since appellate courts have the discretion to consider the entire appellate record when considering federal jurisdiction, a discretionary policy of this Court of Appeals circuit to do so in this case, while a discretionary policy of another circuit not to do so in another case, does not constitute a conflict among the circuits to be resolved by one mandatory rule for all cases by this Honorable Court.

As stated by Wright & Miller,

> "This is an equity case, and it is well established that in such a case, although a reviewing court will usually decide only those issues which are necessary to dispose of an appeal, an interlocutory appeal brings the entire case before the court."

16 Fed. Prac. & Proc., Juris.2d §3921.1.

Accordingly, the rule as to the scope of review of an interlocutory appeal is as follows:

> "[T]he scope of review may extend further to allow disposition of all matters appropriately raised by the record, perhaps leading to final disposition of the case. Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development. Any other rule frequently would require wasted litigation without any offsetting advantage in economy of appellate effort or uninterrupted trial court proceedings."

Id. (citing cases in notes 6 and 7). Further,

> "As with appeals from rulings with respect to interlocutory injunctions, the scope of the appeal should be determined as a matter of *appellate discretion*. Review is proper as to issues that are clearly illuminated by the record, that can be decided without interfering with continuing trial court proceedings, and that fall within a convenient and efficient appellate package."

Id. (Emphasis added.) "Many of the cases of expanded review, moreover, involve questions that generally remain open throughout the course of the litigation, such as subject-matter jurisdiction. . . . " *Id.* Such is the case here.

The plaintiffs' Second Amended Complaint (Opp. App., pp. 1-9) is in the appellate record at pages 1-8. Thus, contrary to the contention of plaintiffs' petition for writ, all of the plaintiffs' claims – including the Establishment Clause claims and the organizational claim of viewpoint discrimination in the grantmaking process – were before the Court of Appeals for jurisdictional inquiry.

Petitioners' Question Number 2

The second question presumes the resolution of the real issue in this case in the question and is improper. The issue is not whether the remedy of barring the state from the *forum* for private speech is available; it is whether there exists a *forum* for private speech at all (or simply governmental speech to which *fora* analysis does not apply). If the answer is that the "Choose Life" message published on the license plate is governmental speech, there is no *fora* analysis at all and no substantial federal question raised by the petition, since it is already established by the First Amendment and other law and jurisprudence that *fora* analysis does not apply to

governmental speech. In such a case, the speech cannot be enjoined, and there exists no federal law or jurisprudence entitling petitioners to force the State of Louisiana to produce license plates for their private speech. Accordingly, the Second Amended Complaint not only fails to state a claim upon which relief can be granted but also fails to raise a substantial federal question in this regard. Thus, there is no federal question jurisdiction here.

Most governments, both federal and state, own property interests, including immovable or real property, movable or personal property, resources, and monies. Public streets, alleys, parks, and public ways have traditionally been considered throughout American history to be places where people can gather and express themselves. Other than those kinds of places, no one has a right to use government property to publish or express his own private viewpoints, but he must do so using his own resources. However, government can deliberately turn over this latter property, either permanently or temporarily, to private persons to engage in their own private speech with the motive to encourage private expression of varying viewpoints and public discourse on any number of issues. Thus, in a recent case, this Honorable Court has succinctly condensed the *fora* analysis as follows:

> "Traditional public fora are defined by the objective characteristics of the property, such as whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate.' . . . The government can exclude a speaker from a traditional public forum 'only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.' . . .

> "Designated public fora, in contrast, are created by purposeful governmental action. 'The government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse.' . . . [A] designated public forum is 'property that the State has opened for expressive activity by part or all of the public'. . . . Hence 'the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.' . . . If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny. . . .
>
> "Other government properties are either nonpublic fora or not fora at all. . . . The government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.' . . ."

Arkansas Educational Television Commission v. Forbes, 523 U.S. 666, 677-678 (1998) (citations omitted). When the government property is "not fora at all," *id.*, content neutrality is not required because the government can shape and proclaim its own message without censorship, variations, or other contrary or confusing messages interjected by private persons. *Rust*, *supra*. The majority opinion in *Rosenberger v. Rectors and Visitors of the University of Virginia, et al.*, 515 U.S. 819 (1995) was careful to explain:

> "The quoted language in *Widmar* was but a proper recognition of the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in *Rust v. Sullivan*, supra, we upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds for family planning counseling. *There, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.*" (Emphasis supplied)

Id., 515 U.S. at 833. And the Eighth Circuit had recent occasion to explain,

> "The Supreme Court has recently distinguished, in dicta, between speech on government property and speech by the government. In *Rosenberger*, 515 U.S. at 833, 115 S.Ct. 2510, the Court noted that 'when the State is the speaker, it may make content-based choices.' Specifically, the Court has 'permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.' *Id. Moreover, whereas forum analysis and viewpoint neutrality may be required when the government 'expends funds to encourage a diversity of views from private speakers,' the government's 'own speech . . . is*

> *controlled by different principles.' Id.* at 834, 115 S.Ct. 2510."

Knights of the Ku Klux Klan, et al. v. Curators of the University of Missouri, et al., 203 F.3d 1085, 1094 n.11 (U.S. App. 8th Cir. 2000) (emphasis supplied). Hence, *fora* analysis does not apply at all when the government uses its own property to engage in its own governmental speech. And this includes the editorial content of the governmental publication incorporating the private speech of private speakers; there, the government is not opening its property to private speakers in order for them to speak their own minds but itself is selecting the particular viewpoints of certain private speakers to be relayed in a governmental message, as when a public educational television channel chooses its broadcasting line-up or when the Environmental Protection Agency (EPA) chooses to publish the views and opinions of certain scientists for its own purposes, such as to support an EPA project. *See Forbes, supra*.

Accordingly, the real issue in this case is whether the State of Louisiana is engaging in its own governmental speech when it publishes the legislatively mandated statutory language and message, "Choose Life," on its own motor vehicle license plates offered for sale to the public as an alternative to the basic plate. If it is, it is not a *forum* of any kind opened to all, or part of, the private members of the public to publish their own counter-messages on other official state motor vehicle license plates, and *fora* analysis does not apply. And the petitioners are not entitled by federal constitution, law, or jurisprudence to force the state to produce special license plates simply for their private speech. As a consequence, the Second Amended Complaint does not raise a federal question at all with

respect to Free Speech or other federal law, and federal question jurisdiction is lacking.

Motor vehicle license plates were never historically any kind of forum whatsoever for private expression. They have historically served strictly public purposes – *e.g.*, to identify which vehicles actually using the public highways, roads, ways, and streets have paid the vehicle registration tax and, for law enforcement purposes, to identify vehicles which may have been involved in the violation of criminal and/or traffic laws, and, in fulfillment of these purposes, to bear and display the exact same unique number as the registration number assigned by the state to the motor vehicle and record owner thereof. *See*, e.g. *State v. Carter*, 95 00703 (La. App. 3rd Cir. 9/12/95), 663 So.2d 152. Motor vehicle registration license plates remain the property of the state and are removable and returnable to the state; upon violations, the state may summarily repossess them. *See*, e.g. La. R.S. 47:505(B), and La. R.S. 32:863.1(C)(1)(a) and (b).

However, there is just enough space on a motor vehicle license plate to publish a brief motto or slogan and perhaps a logo or small image. Usually, the state will place on its basic motor vehicle license plate the state's motto, or a slogan associated with or praising the state in some way, and/or a small image associated with the state. Such motto, slogan, and/or image chosen by the state to be put on its license plates is state governmental speech. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (implicitly recognizing that the motto on an official state motor vehicle license plate is the state's own speech and holding that it

cannot, therefore, be involuntarily forced upon a private person to display on his private vehicle).[5]

However, states began allowing the private members of the public to choose their own vehicle registration number-letter combinations, subject to the restrictions that it be unique, fulfill the identification and law enforcement purposes of license plates, and be suitable for viewing by the general public, including children. But otherwise this license plate is like the regular official basic state motor vehicle license plate. Louisiana allows such a license plate; it is called a "vanity" plate in Louisiana and is a nonpublic forum. It was this kind of license plate that was at issue, for example, in *Pruitt v. Wilder*, 840 F.Supp. 414 (USDC, Va. E.D. 1994) and *Lewis v. Wilson*, 89 F.Supp.2d 1082 (USDC, Mo. E.D. 2000). But this kind of license plate is not involved in this case at all.

Some states provide for the private design of special license plates by private members of the public who are also members of civic, religious, patriotic, historical, genealogical, religious, and educational organizations and who can concur among themselves on their own license plate design for their respective organizations within certain minimum numbers who will agree to purchase same, sometimes for an extra fee, all within the overall motor vehicle license specifications as to vehicle identification and law enforcement purposes for which license plates

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[5] Like the *Rust* case discussed in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541-542 (2001), the court in *Wooley* did not explicitly rely on the doctrine of "governmental speech," but the only way to explain the holding in this case is on such an understanding.

exist. These designs may bear their respective organization's name, motto, or slogan and a small logo or image associated with the organization, but the choice of whether to have such a license plate and what these mottos, slogans, logos, and images will be is left to these private persons. This kind of license plate was at issue in *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F.Supp. 1099 (USDC, Md., 1997). Louisiana has never employed this kind of license plate or statutory scheme.

Louisiana does have, in addition to its regular basic license plate and its "vanity" plate, special prestige license plates. However, the Louisiana Legislature specifies each kind of special prestige license plate; without explicit legislative, statutory stipulation that a special prestige license plate may exist, it does not exist. The special prestige motor vehicle license plate is a another way for the Louisiana Legislature to give recognition, commendation, and honor to certain organizations and groups and to establish specific programs, such as the "Choose Life" motor vehicle license plate program. It is the same as the Louisiana Legislature adopting resolutions, for example, to recognize, commend, and honor certain organizations and groups, such as in the following resolutions from its 2001 Regular Session: Senate Concurrent Resolution (SCR) 20 (urging college students to participate in the Big Brothers-Big Sisters of America); House Resolution (HR) 38 (cancer awareness program); HR 21 and Senate Resolution (SR) 21 (recognizing, commending, and urging

support for the Girl Scouts' Read-to-Lead project).[6] These, like the messages conveyed on Louisiana's basic and special prestige license plates, are examples of quintessential state governmental speech. It is the Louisiana Legislature speaking; it is the Louisiana Legislature expressing its recognition, commendation, and honor for private groups and organizations which have benefitted the public good. In the case of the "Choose Life" special prestige license plate, it is the Louisiana Legislature expressing its own message of encouraging the choice of life and childbirth over abortion and providing a means to fund goods and services for women in crisis pregnancies to further encourage childbirth and adoption as alternatives to abortion.[7]

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[6] These resolutions, and others like them, can be found by using the search features on the Louisiana Legislature's official website on the Internet, "http://www.legis.state.la.us/"

[7] Virginia, in the case of *Sons of Confederate Veterans, Inc. v. Comm'r of Va. DMV*, 288 F.3d 610 (U.S. App. 4th Cir. 2002) *writ petition pending*, seems to have a license plate program between that of Louisiana and that of Maryland in *Glendening*, *supra*, in that only license plates established by law (legislative act) can exist, but the Commissioner of the Va. Dept. of Motor Vehicles, by administrative action, allowed each organization for which there was a license plate to select its own logo or image to appear on the plate. Such administration action would seem to create a nonpublic forum only for the choice of the logo or image to be published on the license plate. But then the Virginia Legislature enacted a law taking that choice away from only one organization while leaving it in place for all the other organizations (raising an Equal Protection issue). Bound up in the questions of that case is the state law question of the subjugation of administrative officers and actions to legislative enactments. The Fourth Circuit, however, made the case more complex by using a four-prong test not approved by this Honorable Court, not to clarify, simplify, or enlighten the identification of governmental speech, but unnecessarily to obfuscate it. It should be obvious that a legislative enactment is itself state

(Continued on following page)

The state, acting through its people's elected representatives in the Louisiana Legislature and its democratic processes, has the right to speak this message. *See* U.S. Const. Amend. 10 (Opp. App., p. 10) and Amend. 1 (Pet. App., p. 1).[8]

> "[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.
>
> * * *
>
> "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a pregnant woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. '*[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.*'"

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speech and so is any message which is directed by a legislatively enacted statute to be published on an official state motor vehicle license plate.

[8] It is submitted that state speech is protected by the First Amendment (Pet. App., p. 1), because the Tenth Amendment (Opp. App., p. 10) secures to the state the right to make the speech and the First Amendment is, first and foremost, a limitation upon the power of the federal government. It forbids the federal government, including federal courts, from sensoring or prohibiting such speech.

Casey v. Planned Parenthood of SE Penn., 505 U.S. 833, 846, 872-873, 877-878 (1992) (emphasis added). Accord, *Poelker v. Doe*, 432 U.S. 519 (1977) and *Maher v. Roe*, 432 U.S. 464 (1977) (states may choose to use their public funds to provide financial assistance for childbirth and not abortion and, being implicitly necessary, to disseminate knowledge thereof); *Rust v. Sullivan*, 500 U.S. 173 (1991) (government's own message may favor childbirth and exclude abortion without viewpoint-discrimination infringement on private speech rights); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (state may prohibit use of its public resources for abortion-related activities and encouragement thereof).

In issuing the preliminary injunction, the district court reasoned,

> "Defendants write:
>
> > "'Louisiana, through its democratic process of legislative enactments, makes a varied number of official statutory messages by the state itself available to those who choose an alternative state message instead of the one on the basic license plate and to pay an additional fee for the same. Without statutory authorization for the plate, it cannot be issued; Louisiana has not made its special design motor vehicle license plates a forum for private speech, slogans, mottos and symbols.'
>
> (Defendants' Memorandum in Opposition at 9). This contention is an oxymoron. The state is using public property to 'speak' to promote its view and to allow members of the motoring public also

> to 'speak' that same message and then contending it has not created a forum for speech."

Henderson v. Stalder, 112 F.Supp.2d 589, 595 (USDC, La. E.D. 2001), Pet. App., p. A-37. Furthermore,

> "Indeed, the defendants maintain that they are articulating a viewpoint legislatively chosen and embraced by the State. Obviously then the intent of the defendants is to convey a particularized message of the 'state's' choosing to promote a 'pro-life' agenda through the motor-vehicle driving public who select a 'Choose Life' plate."

Id., at 596 (Pet. App., p. A-38). The district court actually and erroneously held that the state's engaging in its own governmental speech on its own property *ipso facto* created a forum for private speech on that property and applied *fora* analysis to governmental speech.

> "[O]nce the State creates a forum where viewpoints are expressed, it must be viewpoint neutral. The State has unequivocally taken the stand here that the message 'Choose Life' is its own message and that the democratic process, *i.e.* 'the legislative act', will be frustrated if the Act is declared unconstitutional. The State has chosen license plates as a forum for speech. Once it makes this choice it cannot discriminate against another viewpoint."

Id., at 598 (Pet. App., p. A-42).

Of course, if the district court's holding was allowed to stand, chaos would result for all governments. For example, the federal government printing office (GPO)

publishes and offers for sale books and posters encouraging certain policies of the EPA and posters depicting military personnel, weapons, warplanes, and ships.[9] Private persons who concur in these messages and images buy these posters and display them on their private property (bulletin boards, walls, bedrooms, offices, etc.) to further disseminate the messages inherent in them to other private persons who will see them. But there are other private persons who vehemently disagree with these books and posters. One group sells various books and a poster that reads, "The earth is fine, save yourself!"[10] Still other private persons are opposed to anything military and are appalled that the federal government would publish and offer for sale posters glorifying military persons and weapons systems. Under the district court's ruling in this case, the GPO has made the GPO posters, books, and other offerings a *forum* for private speech, and private persons who disagree with the GPO posters would be entitled to require the federal government and GPO to publish and offer for sale their posters encouraging their opposing viewpoints as well. The error of the district court is in its failure to recognize that *fora* analysis does not apply to governmental speech, which it found that the "Choose Life" message was.

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[9] *See*, for example, on the Internet "http://bookstore.gpo.gov/sb/sb-088.html" and "http://bookstore.gpo.gov/sb/sb-098.html"

[10] *See* "http://www.junkscience.com/store.htm" on the Internet.

Petitioners' Question Number 3

The third question also presumes the answer to the real question in this case and is improper. The real question is whether the petitioners' taxpayer monies must necessarily be spent on the "Choose Life" license plates and program. They did not allege in their complaint how their tax money would necessarily be spent on the program and failed to present any evidence at the hearing on the preliminary injunction that such is the case. Moreover, petitioners omit that, besides the "three dollar and fifty cent handling fee to be retained by the department to offset a portion of administrative costs," La. R.S. 47:463.61(C), Pet. App., p. A-56, the purchaser of the "Choose Life" license plate pays not only the twenty-five dollars that goes into the "Choose Life" fund but also pays "the regular motor vehicle license fee provided in R.S. 47:463," *id.*, which, together with the three dollars and fifty cents, is more than the costs of the license plate and program. The license plates and the program are completely sustainable by the voluntary purchases of the license plate.[11]

The panel was correct in finding the Establishment Clause claim to be too "conjectural or hypothetical,"

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[11] Petitioners are in total error when they suggest that because the monies go first to Bond Security and Redemption Fund, their expenditure on the "Choose Life" activities will reduce state funds available for other purposes. The funds may be used, if needed, to secure the obligations of the state on bonds in any fiscal year, but if they are not needed (which is usually the case), they can be appropriated only for the special statutory purposes for which they exist. Thus, this deposit has no effect on other state funds, except to supplement them to pay bonds in any given fiscal year, only if needed.

Henderson v. Stalder, 287 F.3d 374, 380 (U.S. App. 5th Cir. 2002), Pet. App., p. A-7, for the kind of concrete and particularized, actual or imminent injury needed for proper standing. Moreover, it was correct in holding that the petitioners failed to show that tax revenues will be spent to promote religion. In doing so, it applied the correct test:

> "Unlike the general test for taxpayer standing, which requires 'direct injury' to the taxpayer, *See ASARCO, supra,* the Supreme Court's test in Establishment Clause cases requires only income taxpayer status and the showing of a direct expenditure of income tax revenues on the allegedly unconstitutional program. *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1962)."

Id., at 381 n.7 (Pet. App., p. A-9).

If Planned Parenthood wished to receive funds under this statute, it could do so by establishing a separate affiliate which did not engage in the prohibited abortion activities and could not spend these funds on such activities. *Rust*, *supra*, at 196-198. Its application would be considered for merely advisory recommendation by the advisory council and considered for funding by the Legislature; however, actual appropriations and funding might depend on a myriad of factors, including the efficiency of the organization to deliver services, if funded, and the need of the organization for resources.

The petitioners misread the "secular purpose" of the statute and the secular role of the advisory council in light of that purpose and misread too many governmental powers into the "Choose Life" Advisory Council, which is a body of unpaid citizens who, acting in a merely advisory

capacity, only make recommendations to those with true governmental powers. The Secretary of the Department of Public Safety and Corrections, not the advisory council, is the governmental official who is finally responsible for the establishment and design of the license plate,[12] and in the appropriations process, it is the Louisiana Legislature, not the advisory council, which determines what organizations receive what amounts of these funds. In this regard, the Louisiana Legislature would like to have the merely advisory recommendation of the advisory council, but any one may render his or her own different recommendation to the Legislature in the appropriations process.

Accordingly, this case only involves the secular input of individuals from organizations which seek to establish secular policies which are merely consistent with basic religious values, not to promote any sectarian creed within government. Because of their activities in the secular world in their promotion of childbirth and adoption as alternatives to abortion, they coincidentally have vast personal knowledge of and experience with current organizations and associations which render secular services to women in crisis pregnancies and the effectiveness and efficiency of these organizations and associations in rendering these services. Thus, their secular input is this personal knowledge and experience. Hence, in this facial

[12] Eventually, a design was selected by the Secretary, and it is not religious but secular. The symbol chosen was a pelican (the state bird and symbol for the State of Louisiana) holding in its bill a blanket in which a baby is wrapped. The design of the license plate was introduced into evidence at the hearing on the preliminary injunction and is in the appellate record.

challenge to the statute, the statute can and will operate validly.

The Court of Appeals put it this way:

> "We find the Establishment Clause challenge by Loewy, LaMothe, and the NCJW is predicated on an injury based in conjecture and, therefore, insufficient for federal standing purposes. The argument advanced by these plaintiffs is that because the Choose Life Council is to be comprised of individuals who belong to organizations that allegedly espouse Christian ideologies, the actions taken by the Council, presumably with regard to the manner in which the Choose Life Fund is distributed, will either advance Christianity or will otherwise interfere with their own religious beliefs or principles. There is, however, no allegation that the mandatory members of the Council have yet distributed any money from the Choose Life Fund or that in so doing, or contemplating distributions, they have actually advanced the religious ideologies of their respective organizations or religion in general. At best, the focus of the alleged injury complained of by these plaintiffs arises because of an appearance of future impropriety, which we have found insufficient to confer standing. [Citing case.] Accordingly, we find that plaintiffs Loewy, LaMothe and NCJW, in alleging injury based on the manner in which the Choose Life statute would be administered, have failed to allege 'an injury in fact' and, therefore, lack standing to challenge the facial constitutionality of that statute."

Henderson v. Stalder, *supra*, at 380 (Pet. App., p. A-8). In addition,

> "The state taxpayer plaintiffs allege that they will be injured by the use of their income tax dollars to administer the provisions of the Choose Life statute. We have held that to establish taxpayer standing to challenge the constitutionality of a state statute on the basis of the Establishment Clause, a party must show that 'tax revenues are expended on the disputed practice.' [Citing case.] The terms of the Choose Life statute contradict the plaintiffs' allegation that state income tax dollars would be used for the administration of either the Choose Life Council or the Choose Life Fund. Under the statute, members of the Council serve on a voluntary basis and are not provided 'compensation or reimbursement of any type.' La.Rev.Stat. § 47:463.61(E)(1). Additionally, the statute requires the payment of an additional $3.50 fee, in addition to the regular motor vehicle license fees, to offset a portion of the associated administrative costs. *Id.* at § 47:463.61(C). Under these facts, we find that the complained of injury of the state taxpayer plaintiffs, *i.e.*, use of their income tax dollars to administer the Choose Life statute, is insupportable and, therefore, insufficient to confer standing to challenge the constitutionality of that statute."

Id., at 380-381 (Pet. App., p. A-8, 9).[13] "[T]he psychological consequence presumably produced by observation of

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[13] It must be remembered that the Court of Appeals found that "the plaintiffs' skeletal allegations – *e.g.*, that they are state income taxpayers; that Keeler wants to purchase a license plate expressing pro-choice views; and that Loewy's and LaMothe's "religious beliefs are harmed by the statute" – do not require further development in order to assess

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conduct with which one disagrees," *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982), "is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms," *id.* at 485-486.

CONCLUSION

The Court of Appeals properly dismissed this facial challenge to the statute. The statute is capable of constitutional construction. Since most of the alleged injuries do not exist but are only alleged to occur in the future, they are conjectural and speculative. Thus, petitioners cannot show any actual injury to themselves to sustain standing and jurisdiction. Nothing prevents petitioners from bringing an "as applied" challenge later if any real violation to them does occur. The "Choose Life" message chosen by the Louisiana Legislature and mandated by legislative enactment to appear on the license plate is clearly and

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their standing to challenge the statute," *Henderson*, *supra*, at 379 n.5, Pet. App., p. A-5.

obviously state speech, to which *fora* analysis does not apply. The petition for writ in this case should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

RUSSELL J. HENDERSON, DOREEN KEELER, ROBERT H. LOEWY, GREATER NEW ORLEANS SECTION OF THE NATIONAL COUNCIL OF JEWISH WOMEN, PLANNED PARENTHOOD OF LOUISIANA, EUGENE LAMOTHE Plaintiffs, vs. RICHARD L. STALDER, Secretary, Department of Public Safety and Corrections and JOHN KENNEDY, State Treasurer, Defendants.	X	Civil No. 00-2237, Section "K"

SECOND AMENDED COMPLAINT

Plaintiffs, by and through their undersigned attorneys, bring this complaint against the above-named defendants, their employees, agents, and successors in office, and in support thereof allege the following:

I. JURISDICTION AND VENUE

1. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

2. Plaintiffs' claim for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202; by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

3. Venue is appropriate under 28 U.S.C. § 1391(b).

II. PARTIES

A. Plaintiffs

4. Plaintiff Russell J. Henderson is a resident of Orleans Parish. He pays state income taxes and objects to his tax money being used for the administration of the Act.

5. Plaintiff Doreen Keeler is a resident of Orleans Parish. She pays state income taxes and objects to her tax money being used for the administration of the Act. In addition, she owns a 1996 passenger car and would like to purchase a prestige license plate expressing her pro-choice views but is unable to do so.

6. Plaintiff Robert H. Loewy is a Rabbi in the Reform branch of Judaism and is a resident of Jefferson Parish. He pays state income taxes and objects to his tax money being used for the administration of the Act. His religious beliefs are harmed by the Act's endorsement and advancement of fundamentalist Christian organizations.

7. Plaintiff Greater New Orleans Section of the National Council of Jewish Women ("NCJW") is a non-profit organization established under section 501(c)(3) of the Internal Revenue Code. The Act offends and harms NCJW's principles and beliefs by endorsing and advancing Christian fundamentalism.

8. Plaintiff Planned Parenthood of Louisiana ("Planned Parenthood") is a non-profit organization established under section 501(c)(3) of the Internal Revenue Code. Planned Parenthood provides reproductive health care, including contraceptives, abortion counseling, referrals to abortion providers, and also engages in pro-choice advertising. Planned Parenthood provides non-directive options counseling for pregnant women,

including the options of carrying to term, adoption, and abortion. Planned Parenthood sues on its on [sic] behalf only as to the second and third claims for relief.

9. Plaintiff Eugene LaMothe is a Reverend at the First Unitarian Universalist Church of New Orleans and is a resident of Orleans Parish. He pays state income taxes and objects to his tax money being used for the administration of the Act. His religious beliefs are harmed by the Act's endorsement and advancement of fundamentalist Christian organizations.

B. Defendants

10. Defendant Richard L. Stalder is the Secretary of the Department of Public Safety and Corrections. He is responsible for administering the Act and for collecting revenue obtained under the Act. Defendant Stalder is sued in his official capacity for his actions, taken under color of state law.

11. Defendant John Kennedy is the state Treasurer. He is responsible for receiving the money that is raised by the Act and for maintaining a special fund, established by to [sic] the Act, as well as for disbursing grants under the Act. Defendant Kennedy is sued in his official capacity for his actions, taken under color of state law.

III. THE CHALLENGED STATUTE

12. House Bill 2082 (codified at La. R.S. § 47:463.61 (1999) [hereinafter "the Act"]), a copy of which is attached hereto as Exhibit A, provides that special "prestige" license plates bearing the legend "Choose Life" shall be established by the Department of Public Safety and Corrections

provided there are a minimum of one hundred applicants for such plate. Upon information and belief, more than one hundred persons have indicated interest in obtaining such license plates.

13. The annual fee for such a plate is $25. That fee is to be collected by the Department of Public Safety and Corrections and forwarded to the state treasurer for immediate deposit in the state treasury.

14. In addition to the $25 annual fee for the license plate, an additional $3.50 handling fee is to be retained by the Department of Public Safety and Corrections to offset a portion of administrative costs.

15. A Choose Life Advisory Council (hereinafter "Council") is established by the Act to design the license plates and to design and review grant applications for qualifying non-profit organizations who would like to receive grants from the proceeds from the prestige license plate fees.

16. Members of the Council serve for one-year terms, on a voluntary basis. They receive no compensation. The Act requires that the Council be comprised of the following three members: president of the American Family Association or that person's designee; president of the Louisiana Family Forum or that person's designee; president of the Concerned Women for America or that person's designee.

17. The statute empowers these three members of the Council to appoint, in their discretion, additional members to the Council from the following categories of individuals: physicians who specialize in obstetric or pediatrics; women who have surrendered children for adoption; couples who have adopted children; adoption

advocacy groups; and certified social workers or counselors.

18. An amount equal to the monies received by the state treasury from the "Choose Life" license plates will be deposited into the Choose Life Fund (hereinafter "Fund"). The Council will determine which non-profit organizations are eligible to receive the funds as required by the Act. An organization must demonstrate it provides counseling and other services to meet the needs of expectant mothers; however, no money shall be distributed to organizations that counsel women to consider abortion, provide referrals to abortion clinics, provide abortions or advertise for abortion.

IV. FACTUAL ALLEGATIONS

19. Plaintiffs Henderson and Keeler both pay state taxes and object to the use of their tax payments for administration of the Act.

20. Plaintiff Keeler also objects that there is no similar "Pro-Choice" prestige license plate to allow her to express her pro-choice view on her passenger car license plate.

21. Planned Parenthood would like to apply for and receive funds from the Defendant Kennedy under the Act in order to provide for the material needs of women who are considering placing the newborn child up for adoption if they carry the pregnancy to term, but is ineligible under La. Rev. Stat. § 463.61(F)(2) because it engages in referrals to abortion clinics and advertising that may be construed as "pro-abortion" advertising.

22. The Act necessarily requires that state taxpayer dollars will be used to make and distribute the license plates; establish and maintain the Council; and establish and maintain the Fund.

23. Upon information and belief, 200 license plates have been ordered by the Department of Public Safety and Corrections. Accordingly, state tax revenue will be expended on the production of these license plates.

24. The mandatory members of the Council, representatives from American Family Association, Louisiana Family Forum and Concerned Women for America, subscribe to and promote fundamentalist Christian beliefs.

25. The American Family Association publishes its Philosophical Statement on its website, including the following: "The American Family Association believes that God has communicated absolute truth to man and that all men are subject to the authority of God's Word at all times. Therefore, a culture based on Biblical truth best serves the well-being of our country, in accordance with the vision of our founding fathers."

26. The Louisiana Family Forum publishes its Core Values on its website, including the following: "We believe there is no part of human experience that does not hold God's intense interest. As Creator of humanity, He is fully and equally interested in the totality of that experience." The Louisiana Family Forum maintains a close working relationship with Focus on the Family and Family Research Council. Furthermore, its accomplishments include: promoting a National Day of Prayer Proclamation; and assisting with "Citizens for School Prayer" rally and follow-up activity.

27. Concerned Women for America posts a Statement of Faith on its website, including the following: "We believe the Bible to be the verbally inspired, inerrant Word of God and the final authority on faith and practice. . . . We believe it is our duty to serve God to the best of our ability and to pray for a moral and spiritual revival that will return this nation to the traditional values upon which it was founded."

28. Louisiana State Representative Shirley Bowler sponsored and drafted the Act. Upon information and belief, she recently stated, in reference to the Act, that "Louisiana is, traditionally, a very antiabortion state."

FIRST CLAIM FOR RELIEF

(Establishment Clause)

29. The allegations of paragraphs 1 through 28 are incorporated as though fully set forth herein.

30. The Act violates the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983 because it constitutes an impermissible establishment of religion.

SECOND CLAIM FOR RELIEF

(Freedom of Speech)

31. The allegations of paragraphs 1 through 30 are incorporated as though fully set forth herein.

32. The Act violates the First and Fourteenth Amendments and 42 U.S.C. § 1983 because it infringes upon freedom of speech.

THIRD CLAIM FOR RELIEF

(Due Process)

33. The allegations of paragraphs 1 through 32 are incorporated as though fully set forth herein.

34. The Act violates the Fourteenth Amendment's Due Process clause and 42 U.S.C. § 1983 because it conditions the receipt of funds from the Fund upon criteria that are so vague that they encourage discriminatory disbursements of money from the Fund and fail to give applicants for [sic] money form [sic] the Fund notice of what speech renders them ineligible.

ATTORNEYS' FEES

35. Plaintiffs are entitled to an award of reasonable attorneys' fees and expenses under 42 U.S.C. § 1988.

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court grant the following relief:

36. Enjoin La. R.S. 47:463.61 from further enforcement and declare that it is unconstitutional;

37. Award plaintiffs their costs and reasonable attorneys' fees; and

38. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

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United States Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Louisiana Constitution of 1974, Article 3, Section 16

16. (A) Specific Appropriation for One Year. Except as otherwise provided by this constitution, no money shall be withdrawn from the state treasury except through specific appropriation, and no appropriation shall be made under the heading of contingencies or for longer than one year.

(B) Origin in House of Representatives. All bills for raising revenue or appropriating money shall originate in the House of Representatives, but the Senate may propose or concur in amendments, as in other bills.

(C) The general appropriation bill shall be itemized and shall contain only appropriations for the ordinary operating expenses of government, public charities, pensions, and the public debt or interest thereon.

(D) Specific Purpose and Amount. All other bills for appropriating money shall be for a specific purpose and amount.

(E) Extraordinary Session. Except for expenses of the legislature, a bill appropriating money in an extraordinary session convened after final adjournment of the regular session in the last year of the term of office of a governor shall require the favorable vote of three-fourths of the elected members of each house.

Louisiana Revised Statute 47:505

A. The commissioner shall furnish to every owner whose vehicle should be registered, a plate of a style, pattern, design and construction as may be determined by the commissioner, provided however, that for purposes of enforcing the provisions of R.S. 32:62 B registration license plates issued to the owners of house trailers not equipped with brakes and of less than fifteen feet in length shall be the same in color and design as those issued to the owners of house trailers equipped with brakes and of not less than fifteen feet nor more than thirty-two feet in length. However, the commissioner shall issue to the owners of house trailers which are more than thirty-two feet in length, registration license plates of a color and design differing from those issued to the owners of house trailers of less than thirty-two feet in length.

B. The secretary of the Department of Public Safety and Corrections shall require the removal of all number plates upon termination of the lawful use thereof by the owner. Any dealer of motor vehicles who receives a previously owned vehicle with the intention of reselling such vehicle, shall remove the license or number plate from such vehicle before resale. After the dealer so removes the plate, he shall execute an affidavit attesting to that fact, and attach said affidavit to the title and registration. He shall notify the secretary on a monthly report listing all plates so removed and destroyed. The Department of Public Safety and Corrections, upon receipt of a transfer on such vehicle accompanied by the required affidavit, shall issue a new plate to the new owner in the same manner as if the vehicle had no plate issued to it. The knowing submission of a false affidavit shall be false swearing under R.S. 14:125.

C. Whenever a plate has been destroyed or rendered useless, the owner shall give notice thereof, including the number of such plate, to the commissioner. D. It is unlawful for any manufacturer or dealer to use or display a dealer's plate upon any vehicle not manufactured by such manufacturer or being bona fide demonstrated, sold, purchased, or exchanged by such dealer, or to permit such a dealer's plate to be used in any manner upon the vehicle belonging to himself or his employees, associates, agents, or representatives, or upon any vehicles being operated other than as an incident to and part of the legitimate object and purpose for which such plates are issued.

E. Except as otherwise provided herein, every number plate shall have displayed upon it the registration number assigned to the vehicle and to the owner thereof, the name of this state, which may be abbreviated, and the registration period for which it is issued. Such plates and the required letters and numerals thereon, except the registration period for which issued, shall be of sufficient size to be plainly readable from a distance of one hundred (100) feet during daylight. The commissioner may design and have constructed plates that may be used for more than one registration period when he deems it advisable to do so.

F. If it is established to the satisfaction of the commissioner that due to economic conditions or unavailability of materials it is impractical to issue license plates, he is authorized to provide windshield stickers or some similar means of evidence of payment of the tax and to require that owners of all kinds and types of trucks, semi-trailers, and trailers, stencil on the side or rear of each such vehicle the weight and type of registration purchased for the vehicle. If the commissioner provides windshield stickers

or some similar means of evidence of payment of the tax he shall not be required to issue new registration certificates, as provided in R.S. 47:504 for vehicles registered during the preceding registration period. G. Upon written request by the applicant, the commissioner may issue for commercial vehicles the same type of license plate issued to private passenger vehicles, provided that the cost of said plate shall be at the regular commercial rate.

H. The commissioner is hereby authorized to adopt the use of a number plate which may be retained in use by the owner of the licensed vehicle for as long as the plate remains legible, and to adopt the use of tabs or emblems which may be attached to the number plate to signify renewals thereof. The issuance and design of the number plates and the tabs or emblems therefor shall be executed under such rules and regulations as the commissioner may prescribe.

I. Upon written request by any applicant who possesses a citizen's band radio license, accompanied by proof of ownership of said license issued by the Federal Communications Commission, the commissioner may issue license plates bearing the call numbers issued to such applicant for the operation of a citizen's band radio. The costs of the issuance of said license to the applicant shall be the sum of fifty dollars plus the normal registration fee.

No. 02-523

(3)

Supreme Court, U.S.
FILED

NOV 18 2002

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IN THE

Supreme Court of the United States

RUSSELL J. HENDERSON, DOREEN KEELER, ROBERT H. LOEWY, and GREATER NEW ORLEANS SECTION OF THE NATIONAL COUNCIL FOR JEWISH WOMEN,

Petitioners,

—v.—

RICHARD L. STALDER, SECRETARY, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, and JOHN KENNEDY, STATE TREASURER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioners respectfully submit the following reply to the brief in opposition to their petition for a writ of certiorari filed by Respondents Stalder and Kennedy [hereinafter, "the State"].[1]

ARGUMENT

I. By Exercising Jurisdiction Over A Pleading Filed In The District Court After The State's Notice of Interlocutory Appeal, The Fifth Circuit Exceeded Its Statutory Jurisdiction.

The State defends the Fifth Circuit's exercise of jurisdiction over a new claim[2] added in the Second Amended Complaint filed in the district court after the State filed its notice of appeal, arguing based on a treatise that a court of appeals may exercise jurisdiction over any matter in the appellate record. *See* Opp. Cert. at 10-11. But the mere presence in the district court record of the Second Amended Complaint does not bring that pleading within the ambit of the court of appeals' jurisdiction. *See, e.g., Singer Mfg. Co.*

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[1] The State's Brief in Opposition is cited herein as "Opp. Cert."; the Petition is cited as "Pet."; and the appendix to the Petition is cited as "A-__."

[2] The State briefly reaches the merits underlying this new claim by arguing that the "Choose Life" statute allows an organization like Planned Parenthood of Louisiana to obtain a grant from the "Choose Life" funds "by establishing a separate affiliate which did not engage in the prohibited abortion activities and could not spend these funds on such activities," Opp. Cert. at 25, citing this Court's opinion in *Rust v. Sullivan*, 500 U.S. 173, 196-98 (1991). But the federal statute underlying the regulation at issue in *Rust* was a limitation only on the use of federal funds for use in programs where abortion was a "method of family planning." *See id.* at 178 (quoting statute). The "Choose Life" statute is much broader: it prohibits grants to *organizations* that are "involved in, or associated with counseling for, or referrals to, abortion clinics, providing medical abortion-related procedures, or pro-abortion advertising." A-58.

v. Golden, 171 F.2d 266, 267-68 (7th Cir. 1949) (papers filed in district court but not before the district court when it ruled in a contempt proceeding were not properly before the court of appeals even though they were designated to be included in the record).[3] And the State offers no response whatsoever to Petitioners' argument that a court of appeals in an appeal from a preliminary injunction may only decide issues necessary for review of the district court's order. *See* Pet. 11-12. Thus, the conflict between the cases cited by Petitioners, which impose coherent limits under the interlocutory jurisdiction of the courts of appeals, and the Fifth Circuit's decision to exercise jurisdiction over a later pleading, without regard to any limits on its interlocutory jurisdiction, is a sharp one. Certiorari should be granted to resolve this conflict regarding the important issue of the limitations on interlocutory appellate review.[4]

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[3] Indeed, in each of the three cases cited by Petitioners as the basis for a conflict in the Circuits, *see ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1185 n.4 (10th Cir. 1998); *Derish v. San Mateo-Burlingame Bd. of Realtors*, 724 F.2d 1347, 1348 (9th Cir. 1983); *Dempsey v. Guaranty Trust Co. of New York*, 131 F.2d 103, 104-05 (7th Cir. 1942), the later filed pleading was presumably in the district court "record," within the meaning of Rule 10 of the Federal Rules of Appellate Procedure.

[4] These limitations are also reflected in Rule 4 of the Federal Rules of Appellate Procedure, which governs the timing of a notice of appeal. Thus, if the district court here had issued a final judgment on the new claim raised by Planned Parenthood during the pendency of the State's interlocutory appeal of the district court's preliminary injunction, and if that judgment was adverse to the State, the State's earlier interlocutory notice of appeal would be ineffective to appeal from that judgment. *See FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 276 (1991) (Rule 4 does not "permit[] a notice of appeal from a clearly interlocutory decision . . . to serve as a notice of appeal from the final judgment."). Here, the Fifth Circuit went several steps beyond what is permitted under *FirsTier*: it allowed an interlocutory notice of appeal to be effective as to a claim not even *present* in the district court at the time the notice was filed.

II. The "Choose Life" License Plates Do Not Constitute Government Speech.

The court below held that Petitioner Keeler, the owner of a private automobile with Louisiana license plates, lacked standing to challenge the State's issuance of "Choose Life" license plates on the ground that such license plates do not allow her to express her differing, pro-choice viewpoint on her license plate. Under the reasoning of the court below, Keeler was deprived of standing because she sought to prevent the State from opening this viewpoint discriminatory forum *at all*, i.e., she sought to keep the forum viewpoint-neutral by keeping it closed rather than by expanding it to allow expression of her viewpoint as well. As we have argued, the Fifth Circuit's holding conflicts with several decisions of this Court, in both the First Amendment and Equal Protection Clause contexts, that recognize that a party is not deprived of standing to challenge discrimination (by content, viewpoint, or by class of person) in a government program because she seeks to have the program terminated as a means of eliminating the discrimination. *See* Pet. at 17-23.

The State does not respond to this argument, preferring instead to defend the judgment of the court below on the ground that the "Choose Life" license plates constitute "government speech," and are thus exempt from requirements of viewpoint and content neutrality in the same way as are government-funded publishers and broadcasters. The State cites no authority for the proposition that the "Choose Life" license plates constitute government speech, claiming instead that this Court's holding in *Wooley v. Maynard*, 430 U.S. 705 (1977), must rest on the "understanding" that statements made on license plates must be state speech, because the holding cannot be explained in any other way. *See* Opp. Cert. at 16-17 & n.5. But, as explained by a judge of the Fourth Circuit recently regarding a Virginia special plate, proper analysis of *Wooley supports*

the argument that the "Choose Life" plates are private speech:

> If the message or slogan displayed on a license plate is ultimately attributable to the state that issues the plate [as the State contends here], then the First Amendment claim in *Wooley* ought to have foundered for failure to implicate individual speech rights.
>
> Indeed, the proposition that the state is ultimately responsible for the license plate message in question is weaker here than it was in *Wooley*. In *Wooley*, the slogan in question was required on all non-commercial New Hampshire plates, a fact presumably apparent to anyone driving in New Hampshire. Individual drivers thus had no control over the content of their license plates. Here, in contrast, numerous messages, crafted and selected by the drivers themselves, appear on Virginia's special plates. Plainly, anyone viewing a license plate bearing a motto or logo the viewer knows to have been selected by the driver or owner of the vehicle is more likely to associate the message with that driver or owner than would be the viewer of a state-mandated logo appearing on all noncommercial plates across the state.

Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dept. of Motor Vehicles, 305 F.3d 241, 244 (4th Cir. 2002) (Williams, J., concurring in the denial of rehearing *en banc*) (footnote omitted) (citation omitted). *See also id.* at 246 (Luttig, J., respecting the denial of rehearing *en banc*) ("When a special license plate is purchased, it is really the private citizen who engages the government to publish *his* message, not the government who engages the private individual to publish its message, as in cases like *Rust v.*

Sullivan, 500 U.S. 173 (1991), and *Wooley v. Maynard*, for example. Indeed, "but for" the private organization's and the private individual's action, the special license plate would not even exist; . . . private individuals must request that they be issued such a plate and pay for it over and above the cost exacted for a standard license plate.") (parallel citations omitted).[5]

Thus, *Wooley* does not support the State's claim that the "Choose Life" plates constitute state speech. Nor does the State's slippery slope argument regarding the Government Printing Office (GPO). The GPO is a wholly government-funded entity, *see* 44 U.S.C. § 309, unlike the "Choose Life" plates. Its publications are therefore government speech, just as was the government-funded speech at issue in *Rust*. Moreover, when the GPO sells a poster, book, or other publication to an individual, the publication becomes the private property of the buyer, and is thus clearly not a forum at all. The "Choose Life" license plates, by contrast, remain the property of the State, and thus are, at a minimum, a

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[5] Judge Luttig believed that the Virginia license plates at issue in *Sons of Confederate Veterans*, might "prove to be the quintessential example of speech that is both private and governmental because the forum and the message are essentially inseparable," *id.* at 245, but nevertheless concluded that even a forum opened to such a *combination* of government speech and private speech must be viewpoint neutral:

> I think it is fair to assume that, at least where the government has voluntarily opened up for private expression property that the private individual is actually required by the government to display publicly; the private speech component of the particular communication is significant (whether or not it is significant in comparison to the government's like speech component in that communication); and the government's interest in its speech component is less than compelling, the government will be forbidden from engaging in viewpoint discrimination among the various private speakers who avail themselves of the government's offer.

Id. at 247.

nonpublic forum from which disfavored viewpoints may not be excluded. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998).

Thus, the alternative argument proposed by the State to justify dismissal of Petitioner Keeler's viewpoint discrimination claim is wrong as a matter of law. The State does not appear to contest the error of the Fifth Circuit in ordering dismissal of this claim on standing grounds. It is therefore appropriate for this Court, in light of the direct conflict between the Fifth Circuit's holding and this Court's holdings in cases such as *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), and *Heckler v. Matthews*, 465 U.S. 728 (1983), for this Court to reverse summarily the Fifth Circuit's holding as to Ms. Keeler's standing.

III. The "Choose Life Statute" Requires Expenditure of State Taxpayer Revenue To Promote A Symbolic Union Of The State And Fundamentalist Christianity.

The "Choose Life" statute's delegation of specific governmental powers to the pervasively sectarian Choose Life Advisory Council speak for itself. It is precisely because the scheme of the statute itself accords these fundamentalist Christian organizations special status that the statute's very implementation creates an impermissible symbolic union of Church and State. *See Larkin v. Grendel's Den*, 459 U.S. 116 (1982). Such elevation of the status of one faith above others by giving it a special role in government per se promotes religion, and does so in one of the most damaging ways.

The Fifth Circuit never reached the merits of this Establishment Clause violation, holding that Petitioners lacked standing to assert a claim against the statute. But Petitioners Keeler and Henderson are state taxpayers, and their tax revenues will be used to implement the statute. *See* A-56 (statute states that $3.50 handling fee is retained by the

department of public safety "to offset a portion of the administrative costs" associated with the "Choose Life" license plate program).[6] For the first time in this litigation, the State now asserts that the remaining administrative costs of the program will be paid for by the regular motor vehicle license fee paid by all vehicle owners. *See* Opp. Cert. at 24. But the State cites no evidence to support this factual assertion -- and there is none in the record. If anything, this raises a question of *fact* regarding Henderson's and Keeler's state taxpayer standing, one which must be resolved by the district court in the first instance. Raising such a question of fact does not support an otherwise unsupportable ruling of the court below, which did not even have before it this new-found factual assertion, but instead had before it a statute which on its face requires the expenditure of state taxpayer revenue on a scheme that promotes religion.[7]

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[6] The argument that individuals deciding to place "Choose Life" license plates on their vehicles bear all the costs of the administration of the statute does not, in any event, establish that state tax revenues are not used to implement the statute. The State itself asserts that the $25.00 fee paid to obtain "Choose Life" plates enters the general treasury and is only released to grantees upon specific appropriation by the Louisiana Legislature. *See* Opp. Cert. at 6-9. Thus, the $25.00 fee becomes commingled with all state tax revenues, and loses any character it may have as a pass-through donation to the Choose Life fund. *Cf. Buckley v. Valeo*, 424 U.S. 1, 91-92 (1976) (Presidential election check-off on tax return does not itself appropriate money to Presidential election campaign fund, but simply determines the amount Congress will later appropriate for public funding of campaigns). Of course, serious Establishment Clause concerns would also be raised if a state devoted its tax-collecting machinery to collecting funds that would later be distributed under the guidance of, and via applications designed by, sectarian organizations, such as those that comprise the Choose Life Council.

[7] The State's factual assertion that no taxpayer monies will be spent on the "Choose Life" statute is a stark reminder that the court below improperly exercised jurisdiction over Petitioners' Establishment Clause claim. Even under summaries of interlocutory appellate jurisdiction quoted in the State's own brief, a significant factual issue -- like whether state taxpayer funds will be spent to administer the statute or not -- bars

CONCLUSION

For the foregoing reasons, and to prevent Louisiana's wholesale violation of the First Amendment, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: November 18, 2002.

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appellate jurisdiction over this issue, which was clearly not essential to review of the district court's preliminary injunction. *See* Opp. Cert. at 10 (quoting treatise statement opining that "[j]urisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals *without* further trial court development.") (emphasis added) (quoting Wright & Miller, 16 Fed. Prac. & Proc., Juris. 2d § 3921.1, at 28).